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No. 131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1923.

W. FISH WILSON, County Collector of Taxes of the County of Marion; RICHARD FARRELL, County Collector of Taxes of the County of Clinton; WILLIAM H. PORTER, County Collector of Taxes of the County of Washington; JAMES H. THIMMING, County Collector of Taxes of the County of Perry; and JAMES H. McGUIRE, County Collector of Taxes of the County of Randolph, in the State of Illinois,

Appellants,

v.

ILLINOIS SOUTHERN RAILWAY COMPANY, WILLIAM W. WHEELOCK, as Receiver of the Property of the ILLINOIS SOUTHERN RAILWAY COMPANY; WILLIAM T. ABBOTT, Trustee of the Bondholders of the ILLINOIS SOUTHERN RAILWAY COMPANY and THE MISSOURI AND ILLINOIS RAILROAD COMPANY,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

BRIEF FOR APPELLEES.

GEO. S. GILLESPIE,
Attorney for Appellees.

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Appellants,

v.

ILLINOIS SOUTHERN RAILWAY COMPANY, WILLIAM W. WHEELOCK, as Receiver of the Property of the ILLINOIS SOUTHERN RAILWAY COMPANY; WILLIAM T. ABBOTT, Trustee of the Bondholders of the ILLINOIS SOUTHERN RAILWAY COMPANY and THE MISSOURI AND ILLINOIS RAILROAD COMPANY,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The statement in the brief of counsel for appellants is so partial and incomplete that we feel constrained to

make an independent statement, rather than an attempt to supply its omissions.

This case comes here on a rather novel record. The bill was filed June 3, 1921. Due notice was given of an application for a temporary restraining order on June 3, 1921, and on June 3, 1921, a restraining order was entered. (P. R. 51, R. 50.) Thereafter, on the 10th day of June, 1921, a hearing was had upon a motion of complainants for a preliminary injunction, after due notice to and appearance by the defendants, and the same was granted on hearing. (P. R. 57, R. 60.) On June 23, 1921, defendants filed a motion to dissolve the preliminary injunction and dismiss the bill upon six specific grounds:

(1) Because of the insufficiency of the facts to constitute a cause of action in equity.

(2) Because there is an adequate remedy at law.

(3) Because the bill shows complainants guilty of laches.

(4) Because the bill shows property involved was sold and conveyed to the purchasers subject to tax liens.

(5) Because the allegations in the bill that certain adjustments in the receivers' accounts depend upon the amount of taxes legally due is a mere conclusion of the pleader.

(6) Material averments of the bill are mere conclusions and not statements of fact.

(7) The facts in the bill are not sufficient to entitle the complainants to equitable relief, either by a preliminary or permanent injunction.

(Note that federal jurisdiction was not questioned.)

Upon full hearing on January 24, 1922, said motion was denied and the defendants were ruled to answer the bill on the 20th day of February, 1922. (P. R. 62, Rec. 71.)

On February 20, the Defendants filed an answer denying in detail the material allegations of the Bill, except as to jurisdiction, which was admitted by filing the answer. (P. R. 62, R. 73.) And, on the 12th day of April, 1922, issue having been joined on Bill and Answer the cause was by stipulation and agreement referred to Henry Keefe, a special Master, to take and report the evidence to the Court without any findings on either law or facts. (P. R. 77, R. 103.)

It will be observed that up to this point the jurisdiction of the Court and the sufficiency of the jurisdictional averments of the Bill had not been questioned. On May 1, 1922, Appellants filed a motion to set aside the order of reference, for leave to withdraw their answer and renew their motion to dismiss and file an additional motion to dismiss for want of equity on the face of the Bill specifying the following grounds:

"It appears from the face of the bill of complaint filed herein that the only alleged invalidity of the taxes sought to be enjoined by the decree of this Court consist wholly in discriminatory over-valuation of the property of the complainants.

"It further appears from the allegations of said bill of complaint conclusively that the complainants have an adequate remedy at law and that no grounds are stated in said bill of complaint that would justify a Court of Equity in taking jurisdiction of the matters therein charged and stated.

"Wherefore, the defendants respectfully pray that the order of reference may be set aside, the answer of defendants withdrawn and leave to file this motion granted, and that upon the final hearing of this motion the same be sustained and said bill of complaint be dismissed for want of equity."

(P. R. 78, R. 106.)

Hearing was had upon this motion on July 7, 1922. The order of reference was set aside, leave was granted to withdraw the answer and the same was withdrawn, and the Court ordered that the motion to dismiss the bill of complaint for want of equity be overruled and denied and exceptions were taken to that order. The defendants by their solicitors waived the right to answer, elected to stand by their motion "to dismiss for want of equity" and, thereupon, a default was taken and a decree rendered *pro confesso*. (P. R. 79, 81 R. 107-117.) No certificate was asked or granted showing that the Court passed upon any other questions than those enumerated, and the record does not show that any question was presented to the Court other than

whether the allegations of the Bill state a cause within the **equitable** jurisdiction of the United States District Court. We therefore submit that there is no jurisdiction in this Court to hear this appeal.

The question of equitable jurisdiction is the only question argued or passed upon by the United States District Court. It will be observed by an inspection of the record that during the preliminary steps of this case there was a change of counsel for the Defendants. The first motion to dismiss was filed by Edward J. Brundage, Attorney General, Thomas W. Williams, Assistant Attorney General, F. H. Kruger and Mallory L. Burrows, solicitors representing all of the Defendants, and by the State's Attorneys of each of the respective counties who represent the collectors, who are made parties defendant. The answer filed discloses that the Attorney General and Assistant Attorney General, Mr. Kruger and Mr. Burrows dropped and Mr. June C. Smith the first time appears as solicitor for the defendants associated with the several State's attorneys. When the motion to set aside the order of reference was filed Mr. June C. Smith first appeared as the exclusive representative of the defendants and the several State's attorneys as mere associates and from that point forward the record shows that Mr. Smith has had active charge of the case.

The change of policy upon a change of solicitors is very apparent from the record and shows that the views of Mr. Smith through the trial were that the one question involved is the question of whether there is **equitable jurisdiction,** as distinguished from a jurisdiction at law and by his motion to set aside reference, withdraw answer and reconsider on a motion to dismiss he expressly limited his contest of the allegations of the bill to the question of equitable jurisdiction. (P. R. 78, R. 106.) It follows that is the only issue presented and every other allegation of the bill is confessed as stated, and by the default is admitted to be sufficient because no other objection to the bill was raised or presented on the motions to dismiss. That includes not only the jurisdictional allegations of the bill, but all relevant statements of fact therein to establish want of due process of law and equal protection of the law in making assessments.

By comparing the actual averments of the bill with appellants' statement of fact, it will be seen that many of the material averments confessed are omitted from the statement and there is an entire misconstruction of the whole case before the Court resulting from the misapprehension of counsel as to what is in fact admitted by the motion to dismiss, the default and confession of the allegations of the bill. We assume this condition entirely warrants a statement of the relevant facts of the bill which, for convenience in referring to the same, follows

under the Roman numbered paragraphs of the bill commencing on printed record page 2.

In the margin of the bill, Illinois Southern Railway Company, William W. Wheelock, receiver of the property of the Illinois Southern Railway, William T. Abbott, trustee of the bondholders of the Illinois Southern Railway Company, and the Missouri and Illinois Railroad Company are made complainants and W. Fish Wilson, County Collector of Taxes of the county of Marion, and county collectors of taxes of the counties of Clinton, Washington, Perry and Randolph are made defendants.

After the margin and the address to the Court it is averred that this is a suit of a civil nature and that the matter and sum in controversy exceeds, exclusive of interest and costs, the sum and value of three thousand ($3,000.00) dollars, and the subject matter and parties defendant are located and reside in the eastern district of the United States Court of the State of Illinois.

I.

TITLE TO SUE AND LIABILITY OF COMPLAINANTS.

This paragraph qualifies as complainants the Illinois Southern Railroad Company, a corporation, duly incorporated under the laws of the State of Illinois, William W. Wheelock as receiver of the properties of that railway company appointed by the decrees of the

United States Circuit Courts for the Northern District of Illinois, the Eastern District of Illinois, and the Eastern District of Missouri in certain foreclosure proceedings and alleges that he is still in office by virtue of his appointment, and that the property had been sold to William T. Abbott as the representative of the bondholders under the mortgage or deeds of trust and that he had assigned his certificate of purchase to the Missouri and Illinois Railroad Company, a corporation, under the laws of the State of Missouri; and, that the several trustees of the mortgages had released their several interests in the property to the Missouri and Illinois Railroad Company. These allegations show separate and distinct interests of the several complainants in resisting the alleged illegal taxes, penalties, interest and costs stated in subsequent allegations of the bill, and their personal liability for taxes assessed, while operating the property.

II.

MAKING PARTIES DEFENDANT.

This allegation refers to the margin and makes the tax collectors of the several counties parties defendant.

III.

STATEMENT OF FACTS SHOWING VALUE OF PROPERTY, LOCATION OF RAILROADS AND DESCRIPTION OF PERSONAL AND REAL PROPERTY ASSESSED.

Under this paragraph it is alleged that the Illinois Southern Railway Company subject to the mortgages

and receivership operated said property prior to 1917, the location of the property through the several counties and the general character thereof is fully stated. It describes the property by specific description of the railway lines including all of the appurtenances, buildings, real estate, rails, ties, tools, stations, platforms, tool houses, locomotives, tenders, cars, engines, personal contracts, ordinances, leases, choses in action, rents, profits, income and all manner of real estate and interests therein, and includes all engines, tenders, cars, other rolling stock, equipment and superstructures. It is averred that said property was during the years 1917 to 1920, inclusive, not worth to exceed five hundred thousand ($500,000.00) dollars, and this averment is applied to the personal property described in this paragraph, that is to say, such property is not included in the description "railroad track," as well as to "railroad track." By reference to Paragraph I it will be noted that the sale of this property occurred on September 15, 1920, and, therefore, when all of the taxes involved in this suit became a lien upon this property the complainant, the Illinois Southern Railway Company and the receiver, William W. Wheelock, as we shall show when we come to refer to the law, became personally liable for the payment of all taxes which accrued during that time. It is also averred that such property was in each of the years 1917 to 1920, inclusive, advertised and offered for sale and no one bid

thereon but the property was forfeited to the State for want of bidders. In all subsequent paragraphs when a reference is made to the property described in the bill such reference includes both personal and real property and when application was made for judgment for delinquent taxes the application, as will be shown further on, included both taxes upon real estate and personal property charged against realty. These allegations were confessed by defendants, and they cannot dispute the facts.

IV.

METHODS OF ASSESSMENT BY STATE BOARD AND TAX COMMISSION—EXCESSIVE VALUATION, AND VALUES FIXED BY LOCAL ASSESSORS ON SIMILAR PROPERTY IGNORED.

This paragraph alleges that the State Board of Equalization for the years 1917 and 1918, and the Tax Commission, its successor, for the years 1919 and 1920 pretended to assess *the said property* located in the State of Illinois for the purposes of taxation; and it was the duty of said board and said commission, in making valuations and assessments, to inquire into the full, fair cash value of said property and consider the elements of fair value thereof and ascertain and fix the fair cash value of the same on a mileage basis, or upon some other reasonable basis, and then equalize the same by reducing or raising the value for assessment of said property below or above the fair cash value thereof to attain the same rate of valuation as that upon which

other property of State was valued and assessed by local assessors for the said years, and take as the assessed value thereof for each of said years pursuant to the provisions of the statutes of the State for the years 1917 and 1918, inclusive, one-third, and for the years 1919 and 1920 one-half of the full, fair cash value so reduced as the assessed value of the property assessed by them including the property of the railway corporations known as railroad track and rolling stock, and that said assessment was required by the statute to be based upon a return made to the Auditor of Public Accounts for the first two years aforesaid, and the said commission for the years 1919 and 1920, which was done, as follows: 1917, $345,494.00; 1918, $345,439.00; 1919, $345,601.00; 1920, $345,162.00. That notwithstanding the full cash value of said property was stated in said returns and verified, and the values were in fact full cash values, and an honest and open inquiry into the question would have verified said returns, and there were no facts in existence to be ascertained by inquiry to the contrary; nevertheless, for each of said years, in total disregard of their duties and obligations as public officials, said Board of Equalization and said Tax Commission refused to make any inquiry into the truth in relation to said returns and the values of the property, and fraudulently, wilfully and arbitrarily, without any exercise of judgment as to the full value of said property, without equalizing the

same, to put it upon the same basis as other lands, lots and other property of like character which were assessed by the local assessors, valued and assessed said property at grossly extortionate and excessive rates far in excess of that applied to all other property of the State and fixed grossly excessive full values thereof for each of said years; that on each of said years the valuations fixed were respectively, 1917, $2,045,097.00; 1918, $2,048,898.00; 1919, $1,872,786.00; 1920, $1,269,576.00; that said assessments were excessive by these amounts respectively; 1917, $681,699.00; 1918, $682,966.00; 1919, $936,383.00; 1920, $634,788.00. It is then averred that the values fixed and determined as assessed values were pretendedly one-third the full fair cash value of said property for the years 1917 and 1918, one-half of the full fair cash value of said property for the years 1919 and 1920, whereas, in truth and in fact said value so arbitrarily fixed far exceeds the full fair cash value of said property; that in making said valuations and assessments the said Board and Commission without any pretense of equalizing the property with that assessed by local assessors for said years wantonly and grossly overvalued the property without giving any attention whatever to the elements entering into the value thereof and so grossly disregarded their duty in making said valuations and disregarded the rules prevailing in the making of assessments that said

assessments were fraudulent and void and unjustly discriminatory against the railroad companies and the other of your orators; that they were denied due process of the law and the equal protection of the laws of the State of Illinois in violation of the Fourteenth Amendment to the Federal Constitution. An examination of this paragraph will disclose that all of its averments relate to all of the railroad property mentioned and described in Division III of the bill and includes all of the personal property of the railway company as well as the real property. In other words, "rolling stock" as well as "railroad track". And it describes the method adopted in assessing railroad property and contrasts the same with the method pursued by local assessors in assessing all other property of the same class.

V.

METHODS USED BY BOARD AND COMMISSION SHOWING DISCRIMINATION AGAINST RAILROAD PROPERTY AND COMPLAINANTS.

This paragraph alleges that in making their assessments the local assessors of the State had assessed all other property than railroad property assessed by the Board of Equalization and the Tax Commission upon a method of determining the full fair cash value of each item of property to be assessed, and then reducing the amount so fixed by an arbitrary method to a figure less than 70 per cent of the full fair cash value of the prop-

erty as fixed by said local assessors, and then by taking for the years 1917 and 1918 one-third thereof, and for the years 1919 and 1920 one-half therof; that the Board of Equalization and Tax Commission did not ascertain and reduce the value of property assessed by them by this method, but it was their duty to have done so in order to put railroad property upon the same basis as that assessed by local assessors; but, that the said Board of Equalization and the said Tax Commission well knowing the method applied by local assessors in each of said years in making assessments of all other property of the State than railroad property, nevertheless, disregarded said method and arbitrarily fixed the values aforesaid thereby discriminating against the said railway companies and other complainants in assessing their property at the grossly excessive valuation aforesaid in violation of Section 1, Article 9, of the Constitution of Illinois, which requires every person and corporation to pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct and not otherwise; and, by means whereof your orators were in the making said assessment denied the equal protection of the law and by the said Board of Equalization and the said Tax Commission and the said taxing collectors and taxing officers of said State of Illinois were

proposing and threatening to take the property of your orator without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

By reference to the facts stated in this paragraph and the preceding paragraph it will be seen that the methods adopted and followed by the Board of Equalization and the Tax Commission on the one hand and the local assessors on the other are minutely described and the result to the complainants definitely stated in showing the excessive valuations put upon their property. These two paragraphs taken together in substance allege: (a) Wilful fraud in knowingly and intentionally making the assessments of the property described in the bill at a grossly excessive and unreasonable valuation; (b) Knowingly gross discrimination against complainants in valuing their property by fixing the value thereof for assessment at a much higher rate in proportion to the fair cash value of the same as compared with the values fixed by the Board and Commission and by the local assessors on all other property of the State assessed for the respective years; (c) Fraudulent and unjust discrimination in the method of assessment adopted by the Board of Equalization and Commission as compared with the method of assessment followed by local assessors; (d) Wilful knowing and unjust discrimination

of the Board of Equalization and the Tax Commission in making their assessments based upon the full fair cash value of the property with knowledge that the local assessors were uniformally, methodically and arbitrarily reducing the fair cash value of property assessed by them to a figure below 70 per cent of the fair cash value thereof and for the years 1917 and 1918 taking one-third thereof and for the years 1919 and 1920 taking one-half thereof as the assessed value; (e) Assessment of railroad property and other property assessable by the Board of Equalization and the Tax Commission on the basis of its full fair cash value with knowledge that the method uniformally adopted and followed by local assessors would produce a uniform discrimination between the values fixed by the Board of Equalization and the Tax Commission upon the one hand and upon all other property not assessed by the Board of Equalization upon the other to an extent in excess of 30 per cent higher valuation of property assessed by the Board of Equalization and the Tax Commission in violation of the provisions of the Constitution of the State of Illinois which requires all property of every kind, with exceptions not here involved, to be assessed on a uniform basis of valuation at uniform rates and by uniform methods of assessment in violation of the due process

clause and the equal protection clause of the Fourteenth Amendment to the Federal Constitution; (f) The description in this bill of the general method of assessment adopted and pursued by the Board of Equalization and the Tax Commission conforms to the literal requirements of the Constitution of the State of Illinois, while they clearly show that both the Board and Commission at the time of making their assessments knew that the method uniformally pursued by the local assessors in assessing all other property of the same kind as that assessable by the Board and the Commission would produce a much lower valuation than that of the Board and the Commission and discriminate against the property assessed by the Board and Commission and the owners of such property to at least 30 per cent below the values fixed by the Board and Commission, and yet these two methods concurred and uniformally and methodically produced such unlawful discrimination in addition to the gross over valuation of compalinants' property in excess of its fair cash value alleged; (g) That it is definitely alleged the Board of Equalization and the Tax Commission in making said assessments made by the Board of Equalization and the Tax Commission and the owners of such property so arbitrarily overvalued the property of appellees and discriminated against them in making such overvaluations with respect to the property assessed by local assessors and other railroad property assessed by

them as to show that no judgment was exercised, and, therefore, their assessments were fraudulent and void; (h) That the method of assessment followed as a whole was a complete departure from the due process of law, and equal protection of the law required by the Constitution and laws of Illinois, by the State acting through its taxing officers.

These several averments are alleged to show fraud, want of due process of law and denial of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States as well as a violation of the equality provision of the Constitution of the State of Illinois. No technical defect was pointed out to the averments of the bill in these respects in the the motion ruled upon by the United States District Court from which ruling alone this appeal is prosecuted.

VI.

DISTRIBUTION OF EXCESSIVE VALUES FOR TAXATION—TENDER AND ACCEPTANCE OF TAX DUE ON FAIR VALUE.

This paragraph alleges that after said assessments were made the Auditor of Public Accounts, for the years 1917 and 1918, and the Tax Commission, for the years 1919 and 1920, distributed and certified the value of said railway on a mileage basis to the county clerk of each of the counties aforesaid for each of said years, and that

such county clerks distributed the value so assessed upon the railroad tax books of each of said counties in such manner that the state, county, village, school district and all municipal taxes and special assessments were extended in the proportion of the values of said railways lying in each of the said taxing districts, on the basis of the excessive valuations and assessments aforesaid; and that the valuations were excessive and included divers items of excessive tax which were illegal and in excess of statutory and constitutional limitation of rates of taxation, and a statement of the taxes in each of the said taxing districts and municipalities of the several counties is set forth, showing the excess tax charged, the balance admitted to be due upon a basis of appellees' admissions of liability, after deducting all illegal taxes and deducting the taxes on the excessive valuations so distributed. This is a detailed statement and will be found on pages 11-38 of the printed record.

VII.

STATEMENT OF ILLEGAL TAXES IN ADDITION TO EXCESSIVE TAXES.

This paragraph contains a complete statement of the grounds upon which all taxes are alleged to be illegal on account of excessive rates of taxation, and other grounds and reasons are set forth in detail paragraphs. The amount of tax involved in this item is shown by the table on page 45 of the printed record to be $18,109.67.

VIII.

EQUITY JURISDICTION MULTIPLICITY OF SUITS, ETC.

It is here alleged that the illegally levied taxes upon such excessive valuations and the taxes otherwise illegal as set forth in the preceding paragraph, were levied and extended against the railway of the Illinois Southern Railway Company, becoming a lien upon the property described as aforesaid (again referring to the descriptions contained in paragraph III of the bill). That said property was purchased at foreclosure sale and by conveyances vested in the Illinois and Missouri Railroad Company; that during a portion of the time which the railroad was operated William W. Wheelock, as receiver, became liable for the payment of all taxes legally due upon the property; that Wheelock is still exercising his trust as receiver, and that certain adjustments of his accounts depend or may depend upon the amount of tax legally due; that all of said tax, with interest, penalties and costs, had been extended and charged against the property as delinquent taxes for the year 1921, and it was the duty under the law of the county collectors of the several counties to make application for judgment and proceed to a sale of said property, and, unless restrained, they would do so on the first Monday in June, 1921; and that thereafter they would sell said property (being all of said property) for taxes, and that if said tax should be collected, would distribute the same to a

very large number of taxing districts in the aggregate in excess of fifteen (15) districts per county, and to the State of Illinois, and that it would be impracticable to recover the taxes so paid or collected, and that on account of the sovereignty of the State of Illinois no tax could be recovered from the State.

This averment, together with the other averments of the bill, also shows that the Illinois Southern and Wheelock, receiver, whose duties were almost complete, would be liable for the tax, because it accrued while they were owners or operating the property, and that the lien continued on the property into the hands of the Missouri and Illinois Railroad Company, which company had contracted to pay the tax legally due; but what tax is legally due can only be determined by such an adjudication as is prayed for in this bill; that there are five (5) county collectors threatening to take judgment against five (5) several sections of the railway property of appellees and sell the same for the payment of taxes; that if the tax should be paid to avoid this multiplicity of suits to enforce the taxes, then the money paid would be practically beyond recovery. These several averments are relied upon to show inadequacy of remedy at law, because of a multiplicity of suits and inability to make the adjustments which the bill shows must ultimately be made in a court of law.

IX.

TAX DUE AND NOT DUE.

In this paragraph is set forth a re-extension of the taxes upon the basis of a fair and legal assessment and valuation of the property for each of the years 1917-1920, excluding all excessive, illegal taxes, estimating the amount of taxes legally due to each of the said defendants on the basis of 70 per cent of the fair value of the property assessed. It contains tables prepared by an expert, which show these several amounts to be due and the bill is verified. This statement shows these grand totals: Tax extended, $106,122.42; illegal tax entended, which includes tax not due because of irregular extension in excess of statutory and constitutional limitations and penalties not due, $18,109.67; excessive tax charged, $88,102.75; tax admitted to be due, $19,717.19. The amount admitted to be due is upon the basis of the valuation shown in the allegations of this paragraph, and it is further alleged that no tax remains due and unpaid to any or either of the defendants; that nevertheless the said defendants and each of them threaten to prosecute their several applications for judgments against said property for the remaining illegal, unconstitutional and void tax, and to obtain and enforce judgments against the said railroad properties and against the complainants, thereby taking their property without due process of law and in viola-

tion of the Fourteenth Amendment to the Federal Constitution. This averment also alleges that the action of the said Board of Equalization and the said Tax Commission, and the other taxing officers of the State, by means of the said assessments, as set forth in the bill, are attempting to take the property of the complainants without due process of law, and deny to them the equal protection of the law as the representatives of the State of Illinois. It is further alleged that the complainants are without adequate remedy, save in a court of equity, and the prayer is that the said several tax collectors be restrained and enjoined from collecting said illegal taxes; that writ of injunction may issue restraining them from making application for judgment against the said railroad property, and that upon final hearing the Court will determine the amount of tax that is equitably due to each of the defendants, and upon the ascertainment and payment thereof that a perpetual injunction be issued against them to restrain them from collecting any other taxes, interest, penalties or costs, and for a writ of subpoena and a writ of injunction.

The decree of the Court perpetually restrains the defendants from making application for judgment for taxes at any time subsequent to the entry thereof, "and from bringing any suit or suits for the collection of said taxes, interests, penalties or costs for said years other than the sums already paid and accepted by the defend-

ants for each of said counties," and the temporary and preliminary injunctions theretofore issued are made perpetual. (P. R. 85, R. 116.) This decree is rendered after a finding of the Court that all the taxes due had been tendered and accepted.

It will be found that many of the criticisms of the bill made by counsel for Appellants, as shown by our statement of its substance, are not well founded. The bill should be considered as a whole since the allegations upon its several subjects will not be found in any one paragraph, but a consideration of the whole bill will disclose that it is not defective in any of the particulars indicated by the criticsms of Appellants. Nor did they think so when the original motion to dismiss was considered for an examination of the answer filed will show that none of the present contentions were made in either the motion to dismiss or in the answer.

We shall not follow the order adopted in the Brief of Argument of Appellants, but shall sustain the bill by a citation of authorities in support thereof and then reply to the criticisms made by counsel for Appellants and answer the arguments advanced to show that the bill upon its face does not state a case within the equitable jurisdiction of the United States Courts. We follow this method because Counsel for Appellants have not, in their treatment of the subject, distinguished between the federal jurisdiction of the United States District Court and the equitable jurisdiction of that Court and in our discussion we shall treat these two branches

of the subject separately and endeavor to show what authorities discussed by counsel for Appellants relate to the subject of federal jurisdiction and what relate exclusively to equitable jurisdiction. The statement of the question raised by the motion to dismiss, is as follows:

> "It appears from the face of the Bill of Complaint filed herein that the only alleged invalidity of the taxes sought to be enjoined by the decree of this Court consist wholly of discriminatory overvaluation of the property of the complainants.
>
> "It further appears from the allegations of said Bill of Complaint conclusively that the complainants have an adequate remedy at law, and that no grounds are stated in said Bill of Complaint that would justify a Court of Equity in taking jurisdiction of the matters therein charged and stated."

Counsel for appellants apparently did not intend to rely upon but one point in this Court, namely, that there is no equity on the face of the bill, and this is confirmed by the express waiver of the question of federal jurisdiction on page 56 of his brief in these words:

> "First. There must be federal jurisdiction or a federal question. This requirement is met in all of the cases, as well as in the case at bar, with the averment that the taxpayer is about to be deprived of his property without due process of law. It is not sufficient, however, that this one condition is

found to exist, but it must also concur with the further condition and essential requirement that some ground must be stated for equitable relief."

However, the confusion of these two questions and authorities applicable thereto, to which we have referred, constrains us to cover both points by our brief since it will be necessary to file the same before this Court has passed upon the motion to dismiss for want of jurisdiction to be presented on October 29, 1923. This course is pursued with the understanding upon the part of counsel for appellees that if the motion is allowed the briefs filed will be transmitted to the Circuit Court of Appeals as a part of the Record.

STATEMENT OF THE LAWS OF ILLINOIS IN RELATION TO THE LEVY AND COLLECTION OF TAXES.

ASSESSMENT.

Preliminary to a discussion of the structure of the Bill and the law upon which its allegations are based, it is necessary that we draw attention to the tax laws of Illinois and the methods relating to the assessment of various kinds of property, and the enforcement of the collection of taxes. With exceptions not material to this discussion property is not classified for the purposes of taxation in Illinois. On the other hand, the Constitution prohibits classification of property for that purpose.

"Every person and corporation is entitled to the protection of the constitutional provision, which precludes discrimination in favor of or against any class of property, person or corporation, and the statute, (in relation to assessment by local assessors), is designed to affect that object."

First National Bank v. *Holmes*, 246 Ill 366.

See also:

Peoples Gas Light and Coke Co. v. *Stuckart*, 286 Ill. 164.

Section 10 of Article XI of the Constitution of 1870 provides, that the rolling-stock and other movable prop-

erty belonging to a railroad company shall be considered personal property and liable to execution and sale in the same manner as other personal property.

Property is valued for assessment in accordance with the provisions of the Constitution by different kinds of boards and commissions, depending upon the class or county in which the same is located, and whether of such kind as that it is apt to be located in more than one county. In other words, all tangible property that is of a local nature is assessed by township assessors and deputy assessors under the supervision of supervisors of assessment and county boards of assessor. And, all property such as railways and the property of certain other classes of corporations not of a local nature is assessed by the Tax Commission, and prior to 1919 by the Board of Equalization. The manner of listing and valuing property as to method varies, but it is all required to be first valued at its fair cash value and then assessed at one-half of such full fair cash value beginning that proportion of assessment in the year 1919, but prior to that time at one-third of its fair cash value. The schedules or lists of personal property for the valuation of personal property are made up by the taxpayers with or without the assistance of the local assessor as to local property and is supposed to be verified by the oath of the taxpayer. The supervisor of assessments has various

duties to perform in order to effect uniformity and procure the assessment of all property liable to taxation. His separate duties are performed during the progress of listing and valuing property for taxation. Real Estate, except that assessed by the Tax Commission, is assessed by the local assessors and the statute requires an examination of the property by them to ascertain its fair cash value, and a general valuation thereof is made by the local assessors every four years. Local assessments are subject to review by Boards of Review which are differently constituted in different classes of counties whose duties are similar, being chiefly that of classifying the assessments among the different localities assessed by local assessors and obtaining a valuation of all the property, hearing complaints on assessments and assessing omitted property. The assessment of local property is made as of the first day of April and is supposed to be completed by the first Monday in June of each year. The Boards of Review are supposed to meet on or before the third Monday in June of each year and revise and equalize the assessments of local property within their several jurisdictions and their final figures are certified to the Tax Commission for equalization with all other property of the State and the latter is given practically plenary power to make all assessments equal and put them on the same basis. Prior to 1919 railroad property was assessed by the State Board of Equalization, con-

sisting of an elected member from each congressional district and vested with the duty of not only making original assessment of railroad and certain other classes of property, but of equalizing the assessment of all kinds of property throughout the State so as to place the valuation of all property upon a uniform and equal basis of valuation so that every person and corporation would pay a tax in proportion to the fair cash value of his, her or its property as required by the Constitution. The statute provided that the Board of Equalization should meet on the second Tuesday of August and examine the abstracts of property assessed for taxation in the several counties of the State as returned to the Auditor and equalize the assessments as provided by statute, but it was expressly provided that the Board should not reduce the aggregate assessed value in the State; nor increase the aggregate except in such amount as may be reasonably necessary to adjust equalization and not exceeding one percent on the aggregate assessed valuation. (Jones & Addington, Ill. Stat. 5507, paragraph 9304, Section 105). It is also provided by Section 40 of the Revenue Law that every person, company or corporation owning, operating or constructing a railroad shall return sworn lists or schedules of taxable property of such railroad. (Cahill's Ill. Stat. 1923, p. 2840; and Section 41 provides that such schedule shall be filed with the County Clerk and show the length

of the main and all side and second tracks and turnouts in the county and in each town and village in the county through or into which the road may run, the value of improvements and stations located on right-of-way, and that when the statement has once been made it shall not be necessary to make it again except as changes of property require, but that the company shall in the month of April, annually, report the value of such property by the descriptions required by statute. (Cahill's Ill. Stat. 1923, p. 2840.)

Section 42 provides that the right-of-way, including the superstructures, all side and second track and turnouts and station improvements, shall be held as real estate and assessed as railroad track and in what manner it may be described on the tax books.

Section 45 provides that rolling stock shall be listed and taxed in the several counties, towns, villages, district and cities in the proportion to the length of the main track used or operated therein. (Cahill's Ill. Stat. 1923, p. 2841). Section 46, that tools, material, etc., shall be listed and assessed where located. (Cahill's Ill., Stat. 1923, p. 2841). Section 47, that all real estate, including buildings and other structures not denominated railroad track shall be listed and assessed as lands and lots; and Section 48 provides for a schedule for the assessment of capital stock to be returned to the Board of Equalization.

Section 49 imposes a penalty for failure to file the schedules with the Board of Equalization and local assessors as required. (Cahill's Ill. Stat. 1923, p. 2841-2842).

Section 50 requires the auditor to annually lay before the State Board of Equalization the schedules returned to him and said board to assess the property in the manner provided for by the general provisions of Revenue Law, which apply alike to railroad and other property except as to the formal procedure definitely specified in various sections of the statute. (Cahill's Ill. Stat. 1923, p. 2842).

Section 51 requires the County Clerk to procure at the expense of the county, a record book properly rules and headed in which to enter all railroad property of all kinds listed for taxation, and that he should enter the valuations as corrected and equalized in the manner provided by law thereon and extend the taxes for each taxing district therein. (Cahill's Ill. Stat. 1923, p. 2842). And, also that a warrant shall be attached to the railroad tax book under the hand and seal of the County Clerk at the time the same is handed to the Collector, requiring him to collect the taxes charged against railroad property and account for the same as provided for by law in other cases. (Cahill's Ill. Stat. 1923, p. 2842).

It will be observed from the foregoing provisions that there were three classes of railroad property to be

assessed by the Board of Equalization — "railroad track", "rolling stock" and "capital stock", or, in other words, the franchise or intangible value of the property. The "railroad track" is denominated by the statute as real estate, and other classes of railroad property are expressly made by the Constitution and statute, personal property. It should also be noted that all other property not denominated "railroad track" and all other personal property not denominated "rolling stock" is assessed in the same manner as other property by local assessors; but, such property was all required to be returned by the railroad company in the schedules provided for in Sections 40-45 previously quoted; and, Section 51, requires the listing of railroad property upon a separate book, by the County Clerk and the County Collector is required to collect railroad tax instead of local collectors under a warrant issued to him by the County Clerk for that purpose, this further distinguishing the method of collecting tax upon railroad property from the method adopted in collecting taxes against other property. This section provides that the Clerk shall enter in said book "the railroad property of all kinds as corrected and equalized for taxation."

METHODS OF COLLECTING TAXES FROM RAILROAD COMPANIES.

It will be remembered that paragraph III of the Bill

the statutes here referred to apply, and, therefore, the property in controversy includes real and personal property assessed and valued by the Board of Equalization and Tax Commission; and, also, real and personal property assessed by local assessors, and all averments of the bill refer to all the property described in paragraph III, of the Bill. We call special attention to this because in their brief and argument counsel for appellants have insisted that no personal property was involved in these assessments and proceedings. The statutes to which we have referred are not obsolete on account of the enactment of the Tax Commission Act entitled, "An Act in relation to the assessment of property for taxation," approved June 19, 1919, in force July 1, 1919.

The Tax Commission was created to take the place of the State Board of Equalization and the powers exercised theretofore by the Board were greatly amplified when committed to the Tax Commission. They were given power to prescribe general rules, to provide blank forms for all tax procedure and assessments, to assess railroad property denominated railroad track and rolling stock, to equalize the valuation and assessment of all property throughout the State, to order re-assessment of real and personal property or any class thereof in any county or taxing district, to take testimony, require production of books, papers, compel the attendance of witnesses, and conferred more ample equalizing

authority by authorizing the Commission to lower or raise total assessed value of property in any county, to make it bear a just relation to the assessed value of property of other counties subject only to the limitation that the amount of such increase or decrease in any one county should not exceed ten percent of the total assessed value of all property in the State, and that the aggregate should not be increased except to produce a just equalization.

The usual method of enforcing the collection of taxes upon personal property is by distress and sale of personal property of the taxpayer in the same manner as sales are made under execution issued from Courts of law. This is done in enforcement of tax liens created by statute; and against real estate enforcement is by the return of delinquent lists by the collector, which are made up on the tax forefeiture, sale and redemption record by the County Clerk; and the proceedure is then by publication notice and application for judgment for delinquent taxes in the nature of a proceeding **in rem** on the first Monday in June after the tax is due, and the tax books are in the hands of the collector; and the railroad tax book remains with him, and other provisions of the statute make the lien upon personal property effective even after return of the tax books to the County Clerk; and that statute continues in vital effect the warrant to the collector, so long as the taxes remain unpaid.

All taxes are a lien upon personal property of the person assessed from and after the tax books are received by the collector. There are other provisions of the tax laws which make the owner of real estate or personal property liable to an action of debt for the recovery of any delinquent tax, either real or personal, assessed upon property owned or controlled by him at the time the tax lien attaches thereto, or the tax books are delivered to the collector.

We shall print the various pertinent provisions of the Constitution and statute in an appendix to this brief for convenient reference and index the same, so the Court may see the extent of counsel's misconception of their provisions.

ESTABLISHED PRINCIPLES OF ASSESSMENT AND TAXATION.

The Constitution and statutes of Illinois have been construed by its Courts and certain fundamental principles of assessment and taxation have been established as the law of the State, beyond controversy. The principles here involved may be stated with definiteness and are as follows:

(1) Property for taxation must be assessed by valuation so that every person and corporation shall pay

a tax in proportion to the fair cash value of his, her, or its property.

(2) There is great diversity of methods of assessment, valuation, and of officers and bodies for making assessments and valuations of the several kinds of property to be taxed, but this diversity does not violate the principles of equality and uniformity required by Section 1 of Article IX of the Constitution of 1870, if the result attendant is substantially the same as to each separate method or separate officer or body employed in making the assessment, or if not substantially the same the valuation the difference is such that it can be accounted for as the honest exercise of judgment and not from palpable or gross disregard of duty, or knowing and wilful misconduct of taxing officers amounting to either constructive or actual fraud.

(3) The ultimate authority for fixing the value upon which all taxes are extended in Illinois is the State Tax Commission, and prior to 1919 the State Board of Equalization; that such bodies were and are vested with full power to put all property upon an equal basis by equalizing, property assessed, by local assessors as related to the several assessments of the counties of the State and making assessment of property assessed by such commission or board upon the same basis. In performing its duty, the Tax Commission or Board of Equal-

ization, as the case might be, was and is required to proceed with an honest inquiry and base its judgments upon the actual facts and conditions. Gross disregard of duty by such board or commission, proven by actual facts, or inferred from the gross and palpable over-valuation of property assessed by it as compared with its equalized value of property assessed by local assessors, is held to be fraudulent and a denial of the due process of law and equal protection of the law by such board or commission in performing its duties, having committed to it State authority under the exercise of which alone it can act at all. Such action of such board or commission is State action and a denial of due process of law and the equal protection of the law in violation of both the Constitution of the State of Illinois and of the 14th Amendment to the Constitution of the United States.

(4) That railroad track is, under the Constitution and laws of Illinois, real estate, and all other property except lands and lots not used for railroad purposes is personal property, and the laws in relation to the collection of personal tax and real property tax from personal property applies to railroad companies and makes their rolling stock and all other personal property subject to distress and sale, without the intervention of the judgment of a Court, at the will of the tax collector

from the time of the delivery of the railroad tax book, upon which the taxes are charged until the tax is paid.

(5) That the taxes on property of railroad companies are assembled on a book called the "Railroad Tax Book" and must be collected by the County Collector and not by deputy collectors or township collectors, and the application for judgment for delinquent taxes is based upon the railroad tax book. Attached to the railroad tax book is a warrant which authorizes the collector to levy upon any personal property of a railroad company and collect by sale of such property in the same manner as sales upon execution, any tax, real or personal, of such railroad company, past due.

Reference to the appendix containing the Illinois statues will fully sustain this statement.

BRIEF OF ARGUMENT.

As we have shown the motion to dismiss raised but a single question, whether the bill on its face states a cause within the equitable jurisdiction of the United States Courts as those courts have settled that jurisdiction by their decisions. Nevertheless, in his brief on the motion to dismiss, (which motion is yet undetermined), counsel for appellants attempted to construe into the record a denial of due process of law which he claims is implied by the statement in his motion to dismiss in the District Court in these words, "It further appears from the allegations of the bill of complaint conclusively that the complainants have adequate remedy at law." Therefore, we deem it proper to discuss briefly two questions: (a) Whether the allegations of the bill state a case within the jurisdiction of the United States District Court as a federal court; and, (b) whether the allegations of the bill state a case within the equitable jurisdiction of the United States Court, as a court of equity.

In addition to these two questions we shall reply to the fallacy advanced by counsel for appellants that because there may be a remedy for the alleged violation of the Fourteenth Amendment to the Federal Constitution under the laws of Illinois, therefore, there is an adequate remedy at law within the interpreted meaning

of that phrase and the Court should have dismissed the bill for want of equity.

The misconstruction of the record, the issues and the decree by counsel for appellants made it necessary for us to fully state the substance of the bill and the proceedings in the Court below. It will not be necessary for us to repeat that statement or discuss the facts of the bill except as they relate to the questions directly involved or claimed by counsel for appellants to be involved.

I.

THE ALLEGATIONS OF THE BILL ESTABLISH THE JURISDICTION OF THE DISTRICT COURT AS A FEDERAL COURT AND ARE CONCLUSIVE THAT THE STATE OF ILLINOIS, THROUGH ITS STATE BOARD OF EQUALIZATION AND STATE TAX COMMISSION, IN VALUING THE PROPERTY OF COMPLAINANTS FOR ASSESSMENT, DENIED TO THEM DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW, AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Paragraph 1, Section 24, of the Judicial Code, conferring jurisdiction upon the District Courts is as follows:

> "First: * * * of all suits of a civil nature at common law or in equity brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming land grants from different states, or where the matter in controversy exceeds exclusive of interest and costs the sum or value of three thousand dollars, and (a) arises under the Constitution and laws of the United States, etc."

The question first raised by the filing of the bill was whether the United States District Court had jurisdiction as a federal court to hear the matter presented. This question related to the power of the Court and upon the theory of the bill before the Court could exercise any power there must have been a claim that a right guaranteed by the Federal Constitution or valid laws made in pursuance thereof had been violated, or infringed.

This requirement was met by the allegation that the action of the State Board of Equalization and the State Tax Commission was in conflict with the Fourteenth Amendment. Whether that claim was well or ill-founded was a question which might or might not be an issue for decision upon the hearing of the cause upon its merits and whether in issue had no direct relation to the question of jurisdiction. If the defendant desired to contest whether there was in fact a violation of the Fourteenth Amendment in the manner alleged he should have raised that question by motion and preserved it in the record for review by this Court, or raised it in some other way, so that the record would show that the District Court in fact adjudicated an issue between the complainants and defendants with respect to the alleged violation of the Fourteenth Amendment. As we have shown, that was not done, but, on the contrary, the record shows that counsel for appellants so limited his motion to dismiss that only the question of jurisdiction in equity, as dis-

tinguished from jurisdiction at law, was raised.. However, had the question been raised, we shall later show that it was unnecessary for the Court to decide it, for having taken jurisdiction of the cause, if the bill presented a case within the equitable jurisdiction of the District Court as distinguished from its jurisdiction as a federal court, and there was a bona fide presentation of question to the Court by complainants' pleadings, then although the Court might have decided that question against the complainants, yet, if upon consideration of the bill upon motion to dismiss, or the facts in support thereof upon a trial of the issue complainants has established a case within the equitable jurisdiction of the Court, it would have been its duty to decide the case upon its merits, although it felt constrained to decide the federal question adversely to the complainants.

The question whether the allegations of the bill state a bone fide federal question can only be determined by a reading of the bill at large for the allegations showing the conduct of the taxing officers of the State of Illinois are contained in several paragraphs and no single allegation can be isolated and treated as the only foundation upon which the claim of federal jurisdiction must rest. An examination of the bill as a whole, however, will disclose in definite allegation the following facts:

(1) That in making the assessments the State Board of Equalization and State Tax Commission wil-

fully and arbitrarily assessed the tangible property of complainants and all other railroads upon the basis of its full, fair cash value, when they knew that local assessors had assessed all other tangible property on the basis of more than seventy (70%) per cent below its fair cash value, and did not attempt to raise and equalize the assessments of other property made by local assessors, or reduce the original assessments made by them, so as to put all tangible property of the same class under the Constitution upon the same basis; and, it is alleged that this was knowingly and wilfully done, and caused such gross discrimination against appellees and their property as constituted an actual and constructive fraud upon complainants, and therefore a denial to them of due process of law and equal protection of the law, under the Fourteenth Amendment.

(2) That the system of assessing by the State Board of Equalization was to base its assessments upon fair cash value, while the local assessors based all of their assessments upon less than seventy (70%) per cent of fair cash value, and this was known to both the local assessors and the Board of Equalization and Tax Commission as systematically persisted in, covering all the years for which this property was taxed.

(3) That the returns under oath to the State Board of Equalization and the State Tax Commission for the several years were as follows:

For the year 1917.....$345,494.00
For the year 1918..... 345,439.00
For the year 1919..... 345,601.00
For the year 1920..... 345,162.00

And that such returns were and were known by the State Board of Equalization and the State Tax Commission to show the full, fair cash value of complainants' property, but they knowingly, wilfully and fraudulently valued the same for assessment at

For the year 1917.....$2,045,097.00
For the year 1918..... 2,048,898.00
For the year 1919..... 1,872,786.00
For the year 1920..... 1,269,576.00

That the discrimination against complainants in the method of assessment adopted resulted in their having charged against them, instead of $27,709.86 taxes, the aggregate is $106,122.42, of which but $18,109.67 is excessive or illegal taxes and penalties, and this large sum does not include penalties, interest and costs since 1921, in the estimated further sum of $30,000.00. And, it is alleged that the overvaluation producing this discriminatory result is so gross that it was fraudulent and void, but that the assessments were made wilfully and knowingly by the State Board of Equalization and the State Tax Commission with full knowledge of the overvaluation and discrimination which would flow therefrom.

(4) That the method of assessing the tangible property of railroad companies and the property of the complainants in particular, and the method of equalization of all other property of the State adopted and followed by the State Board of Equalization, as set forth in the bill, was contrary to the provisions of the Constitution and laws of the State of Illinois, and the rules of valuation and assessment adopted and followed by the State Board of Equalization and the State Tax Commission as applied to all other property; that in assessing all other property the State Board of Equalization and the State Tax Commission valued the same at its fair cash value and took as the assessed value prior to 1919 one-third thereof and subsequent to 1919 one-half thereof as the assessed value; that they did not equalize other property assessed by local assessors, to put it on the same basis as that upon which they placed railroad property; therefore, it follows that they departed from the Constitution and statutes in making these assessments and equalizations in the following particulars:

(a) They did not, as the law requires, either reduce the fair cash value of railroad property to a point less than seventy (70%) per cent of its fair cash value arbitrarily to fix a basis for assessment, as was done by all other taxing officers of the State, and put it on the same basis of valuation as such other property had been

placed, nor raise the assessments on all other property of the State under their power to equalize, so that other assessments would represent for the years prior to 1919 one-third of its cash value and since that time one-half of its cash value, as was the case with all railroad property assessed by them.

(b) They did not assess the property of complainants on the same basis that they assessed all other railroad property, but instead of valuing it at its fair cash value, they so grossly overvalued it that they could not have but known that they were doing so; and it is alleged that they knowingly and wilfully overvalued it in 1917 5.82 times its full value; in 1918, 5.93 times its full value; in 1919, 5.42 times its full value; and in 1920, 3.67 times its full value.

(5) It is further averred that this property was in litigation; that the tax had not been paid, but forfeited to the State for want of bidders at tax sales year after year; that it was generally known throughout the State and especially by the Board of Equalization and the Tax Commission that this railroad company was bankrupt and unable to pay operating expenses, and for that reason had suspended operation, and that its property was worthless for railroad purposes; that there were no facts upon which an honest inquiry as to the value of its property would have determined its value to be in excess

of that shown by the returns for each of the several years; that the Board of Equalization and the Tax Commission, though vested with power and authority and charged with the duty of making such investigation, made none, but acted totally and wholly in disregard of their duties under the requirements of the law and the knowledge of the value of this property possessed by them, and arbitrarily and grossly overvalued and assessed the property in violation of the rules of valuation adopted by them and the Constitution and laws of the State; that these facts constitute a denial of due process of law and of the equal protection of the law by the State of Illinois through the unlawful action of its State Board of Equalization and State Tax Commission by the concurrent enforcement of valid laws for the collection of taxes by other taxing officers.

It would seem it is conclusively established by the decision of this Court that the methods of the State Board of Equalization and the State Tax Commission are accurately characterized and illustrated by the allegations of the bill. Their methods were, in a case similar to this, illuminated and condemned by the Supreme Court of Illinois. In a legally synonymous case the action of the State Board of Equalization, in making an assessment of the capital stock of a corporation, was held to have violated the Constitution of the State of Illinois,

requiring equality and uniformity in making assessments and the findings of the Court necessarily establish a taking of the property of the taxpayer without due process of law, and denying such equal and uniform assessment as would within the meaning of the Fourteenth Amendment be a denial of the equal protection of the law. In that case the Court stated the averments of the bill and said:

> "The appellant's case is not based upon an actual valuation of its property above its fair cash value, but upon an intentional, and therefore fraudulent, systematic undervaluation for assessment of all other property in the State, and particularly by the State Board of Equalization, of the value of the capital stock and franchise above the value of the tangible property of all other corporations except the appellant. The case is substantially that appellant's property was assessed at practically its full value, while all other property was so grossly undervalued as to make the appellant pay a much larger proportion of the taxes than it should."

In this case, our bill fully shows a similar state of facts, and in addition that there was an intentional overvaluation of appellees' property in excess of other property of the same kind and class assessed by the Board of Equalization and Tax Commission, averaging for the four years 5.22 times the fair cash value of the property.

It was averred with respect to the manner of assessment in that case:

"That it is a gross fraud upon the appellant and imposes upon it a greater proportion of the public burden than is borne by other similar corporations and than is borne by any other property of the same value, and amounts to the taking of the appellant's property without due process of law, imposes an unequal burden of taxation, and is therefore in contravention of the provisions of the Constitution of the State requiring that taxes shall be equal and uniform throughout the State."

In summarizing the conclusions of the Court, Justice Dunn said:

"The State Board of Equalization has the duty of equalizing the valuation of property as listed and assessed in the different counties of the State in accordance with the provisions of the Revenue Act. It is also an assessing body, whose duty it is to assess, among other things, the capital stock of certain corporations, and it has the power to adopt rules for that purpose, which it is bound to adhere to and faithfully apply in all cases where they are applicable. An assessment arbitrarily made by the board in disregard of its own rules for ascertaining the value of the capital stock of corporations cannot be sustained. (*Calumet and Chicago Canal and Dock Co.* v. *O'Connell*, 265 Ill., 106.) The collection of a tax extended upon such assessment will be enjoined. (*Calumet and Chicago Canal and Dock Co.* v. *Stuckart, supra.*) The Board of Equalization which made this assessment was bound to make it according to law and the rules which it had promulgated for assessing the capital stock of corporations. It did

not do so, but knowingly and intentionally disregarded its rules completely, making no pretense of applying them in the great majority of cases and making its valuations in the individual cases according to its will without reference to the rules, instead of according to its judgment with reference to the rules. The appellant was knowingly and intentionally discriminated against, and the result was a fraud upon it. The assessment cannot be sustained."

The People's Gas Light Co. v. *Stuckart*, 286 Ill., 177.

In discussing the illegality of departure by the State Board of Equalization from the methods of assessment adopted by it in the assessing of property of an individual taxpayer, the Supreme Court of Illinois, in another case, said:

"The State Board of Equalization has no right, in disregard of its own rules established for the assessment of the capital stock of all corporations, arbitrarily to assess the capital stock of one corporation by an exercise, not of its judgment but of its will, without reference to the requirements of those rules. According to the averments of the bill, that is what was done in this case, and the demurrer should have been overruled."

Calumet, etc., Dock Co. v. *O'Connell*, 265 Ill., 110.

In another case in which the State Board of Equalization assessed the capital stock of a dock company without giving consideration to the market quotations of its stock during the period of taxation, the Supreme

Court of Illinois held that in ignoring such evidence and making the assessment on an arbitrary basis without giving consideration to the actual value of the stock its assessment was arbitrary, fraudulent and void. This was but another way of saying that such an assessment denied to the dock company due process of law and the equal protection of the law. The Board hal certain rules in relation to the assessment of capital stock and those rules were also disregarded in making this assessment. The Court said:

> "The assessment of capital stock must be made by the board in accordance with its rules. The evidence cited indicates that the assessment was not so made. It was assumed that the corporation enjoyed some special rights by virtue of its charter. While the board is not necessarily bound by the market quotations of the shares of stock in determining their value, these cannot be disregarded and an assessment made without evidence and in violation of the rules of the board sustained, even though the assessment of the tangible property were regarded as lower than it should be."

If assessments in violation of rules made by the Board or Commission resulting in injury to the tax payer is a fraud, and denial of due process of law, what must be said of an assessment in violation of the Constitution, wilfully made in face of actual knowledge that the assessments are grossly excessive?

Calumet, Etc. Dock Co. v. *Stuckart*, 275 Ill. 255.

It will be observed that want of due process of law and equal protection of the law as defined by the federal courts is present in all of these Illinois cases, because there was arbitrary action without the exercise of judgment and discretion; assessments were made by the exercise of will instead of judgment. Turning to a discussion of this subject by writers on the Federal Constitution and the federal courts we find:

(a) ASSESSMENTS SHOW WANT OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

McGehee, Due Process of Law, says:

> "While the English provision exists solely against executive action, under our system of paramount written constitutions, to which all departments of the government are equally subject, the provision extends alike to the executive, judicial, and legislative activities of the states and the nation."

McGehee, Due Process of Law, p. 26;
See also, *Chicago R. Co. v. Chicago*, 166 U. S., 226.

Due process of law and law of the land are phrases indicating practically the same thing. Mr. Webster, in in Dartmouth College case, gave a definition to due process of law or law of the land which endures to this time and is as follows:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that

every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society."

This Court has said:

"Due process of law within the meaning of the (Fourteenth) Amendment is secured if the laws operate on all alike and do not subject the individual to any arbitrary exercise of the powers of government."

Giozza v. *Tiernan*, 148 U. S., 657;
Yick Wo v. *Hopkins*, 118 U. S., 356.

This Court also said, in Ex p. Virginia:

"They, (the words of the Fourteenth Amendment here involved), have reference to the state actions of the political body denominated a State, by whatever instruments or in whatever modes that action may take. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The Constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. **Whoever, by virtue of public positions under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the law, violates the Constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State.** This must be so or the Constitutional inhibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

McGehee on Due Process of Law, p. 27;
Ex p. Virginia, 100 U. S. 339;
Hovey v. Elliott, 167 U. S., 409.

In a case somewhat similar to this in which the State Board of Equalization being required by the Supreme Court of Illinois to re-assemble and make an assessment of property in accordance with the law, arbitrarily and wilfully assessed the same without the exercise of judgment or discretion under circumstances which indicated either that the board acted under fear of contempt of the Supreme Court, or out of resentment because they had been commanded to re-assemble and do their work over. After discussing that situation Judge Grosscup, sitting as a circuit judge, deduced the correct principle as follows:

> "The sum of it all is that by whatsoever causes brought about the reassessment complained of did not in our opinion express the real judgment of the State Board as an independent tribunal and were, therefore, in effect fictitious judgments for the impeachment of which, somewhere, the law holds out opportunity to the parties injured."
>
> *Chicago Union Traction Co. v. State Board of Equalization*, 114 Fed., 505.

He then concluded that as the Constitution and laws of Illinois provided due process of law and the Board of Equalization wilfully and intentionally departed therefrom and assessed the property involved in that suit at a grossly excessive valuation as compared with the assess-

ment of other property of the State without exercising any judgment, but arbitrarily, that such action was a denial of due process of law; that the Board of Equalization represented the State, its action was State action, and its want of the exercise of judgment wrom whatever cause gave to the aggrieved taxpayer the right to resort to the federal courts under protection of the due process of law provision of the Fourteenth Amendment of the Constitution. His discussion of the subject is most interesting and illuminating and is as follows:

> "Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the state. It includes the initial authority to levy taxes; the purpose to which the money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards or of men. Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for the tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes in the laying and distributing of which there is a substantial departure from law, is the depriving of the citizen of his property without due process of law.
>
> "A substantial step in the taxing process as fixed by the law of Illinois as a step essential to the distribution of the burdens of taxation, is the decision and judgment of the State Board of Equaliza-

tion. The board's place in the taxing system is that of a quasi-judicial body. Its judgment affects, as keenly as that of any court, the property interests collectively of the several districts of the State, and directly and individually of the persons and corpora-

"No court can by its judgment grasp more completely what would otherwise remain the property of the individual. In no other tribunal can there be found apter illustration of the power of the State to compel the individual to deliver up his property under stress of law. It needs no argument to show that power such as this is only exercised rightfully when exercised judicially. The prime quality of every judgment, without which it is no judgment, is, that it is the final thought of the judge on the subject submitted, unaffected by extrinsic influences. This implies freedom of mind—not merely theoretically, but practically—the freedom of mind that does not fear, that has no wish of its own, that sees nothing not seen through the lenses of the law. Judgments honestly made up in such an atmosphere, though subject to review for error, are due process of law. Judgments affected by fraud or fear, however solemnly entered are nothing, when weighed by the constitutional guaranties thrown around liberty and property."

Chicago Union Traction Co. v. *State Board of Equalization*, 114 Fed., 566.

This was said not of the legal procedure of Courts in enforcing collection of taxes subsequent to assessment, but of the acts of this board in making arbitrary assess-

ments without the exercise of honest judgment as required by law.

The case of *Chicago Union Traction Company* v. *State Board of Equalization* was succeeded by the case of *Raymond* v. *Chicago Union Traction Company*, which was based upon substantially the same facts. The assessment made by the State Board of Equalization in obedience to the mandate of the Supreme Court of Illinois was certified to the County Clerk of Cook County, and the tax extended against the property of the Traction Company. A suit was then filed in the United States Circuit Court for the Northern District of Illinois to restrain him from collecting the tax. The bill tendered the amount of tax due on the same basis as other property of like character was assessed by the State Board of Equalization and by local assessors. The questions raised in that case were the same as those raised here and Mr. Justice Peckham on consideration of the record cited the case of *Louisville Trust Company* v. *Stone*, 46 CCA 299, and quoted from the same with approval in these words:

> "In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the Court said: 'It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects

an unjust discrimination against the property of which the plaintiff is the owner, and a bill of equity will lie to restrain such illegal discrimination, and that in such cases federal jurisdiction will arise because of the equal protection of the laws guaranteed by the 14th Amendment.' "

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 36; 53 L. ed. 87.

It will be observed that the quotation from the Louisville Trust Company case was intended as a summary of the principles involved in the case under consideration, and in support thereof the Court cited the following additional cases:

Reagan v. *Farmers' Loan & T. Co.*, 154 U. S. 362, 390, 38 L. ed. 1014, 1021;
A. Backus, Jr., & Sons v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565, 42 L. ed. 853;
Fargo v. *Hart*, 193 U. S. 490, 502, 48 L. ed. 761;

This Court then discussed the principles involved and emphasized the facts as exceptional, but so far as the same were quoted or refrred to in such discussion they involve precisely the same principles as are involved in the case at bar.

It was said:

"The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property

the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state, which the state might do (*Coulter* v. *Louisville & N. R. Co.* 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the Constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her, or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discrimination which, under these facts, was the action of the state through the board. *Barney* v. *New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502, holds that where the act complained of was forbidden by the State Legislature, it could not be said to be the act of the State. Such is not the case here."

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 36-37; 53 L. ed. 87.

The controlling fact in this case was that the State Board of Equalization did not exercise its judgment, but departed therefrom and knowingly made an arbitrary assessment which placed upon the taxpayer an excessive and unjust burden, as compared with the assessments by local assessors and other assessments by the State Board of other property of the same class as classified by the Constitution. What caused the board to so act, and whether there were other remedies that might have been exhausted under the laws of the State, were not considerations which entered into the decision, but such questions were argued in the briefs of appellant. The emphasis which we shall see was put upon the fact that the discrimination was uniform in the diverse action of different assessing bodies, merely recognized that such uniformity overcame the presumption of honest, if mistaken judgment, which the Court might otherwise indulged; but the Court did not mean to imply that a single act of taking the property of a citizen through arbitrary State action would not find a remedy in the original jurisdiction of federal courts.

It will be observed from the last preceding quotation from the *Raymond case* that it was assumed in argument by the Court that property may be classified and franchises assessed on one basis while tangible property is assessed upon another. In this assumption the court

was in error and doubtless for the moment did not have in mind the provision of the Constitution of Illinois which forbids classification of property for assessment except as specifically otherwise provided by the Constitution.

By reference to the dissenting opinion of Justice Holmes in the Raymond case, it will be observed that he argued the position that is now assumed by counsel for appellants, namely that there were remedies at law under the statutes of Illinois which oust the federal court jurisdiction to enforce the Constitution of the United States in the exercise of its original jurisdiction, but the court held the contrary view.

It is true that in the case of Taylor v. Louisville & Nashville R. Co. 31 CCA 537, the United States Circuit Court of Appeals in considering whether there was equity jurisdiction in the District Court seemed to assume, as we think, improperly, that if there were state remedies at law a United States Court would be deprived of its equitable jurisdiction, but held that a proceeding by Writ of Certiorari was not such a remedy, and, therefore, that the complainant might have had the tax record reviewed by Writ of Certiorari did not deprive the Court of equity of jurisdiction. As we understand the opinion in that case, however, the remedy by certiorari was supposed to be in the Federal Courts.

Here there is no state remedy to review the action of the State Board of Equalization, and the only remedy to review the action of the Tax Commission is by an appeal in the nature of Certiorari by which the legality of the assessment could be questioned upon such record as the Tax Commission may be willing to certify. So, such remedy would under the authority in the Taylor case be held inadequate. Moreover, as we shall show when we discuss another branch of this question, this court has since established beyond controversy that whether there are state remedies is wholly immaterial.

In the recent case of Greene v. Louisville & Interurban R. Co., this Court upon a similar state of facts sustained the doctrine of the Raymond case and held that diversity of method as between a state taxing board and the local assessing bodies in method of assessment resulting in a grossly excessive valuation for taxation of the property of that class of taxpayers assessed by the State Board as compared with those assessed by local assessors is a denial of due process of law and of equal protection of the law in violation of the Fourteenth Amendment to the federal Constitution. The material facts stated by the Court in its opinion in the Louisville & Interurban Railroad Company case, are essentially the same as those stated in the bill in this case, and the question was raised there by motion to dismiss

which directly contested the want of federal jurisdiction because no federal question was involved, which was held by the Court to amount to a general demurrer.

The essentials of the tax laws of Kentucky are the same as they are in this State. This is admitted by the brief of counsel for Appellants, except it is contended there is a material difference between the remedies for the enforcement of tax collection in Kentucky as compared with such remedies in Illinois, which we shall show later is not the case. Therefore, with respect to the question we are now considering and with that possible exception it is practically agreed that the Greene case is on all fours with the case at bar. We think, however, an examination of the bill in this case will disclose that it states a much stronger case than the Greene case. Discussing the pertinent question of federal jurisdiction this Court said:

> "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the State Legislature, are in themselves unconstitutional. *Regan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, was a case not of an unconstitutional statute, but a confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: 'Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of

jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual.' In Raymond v. Chicago Union Traction Co. 207 U. S. 20, 38, 52 L. ed. 78, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, the Court upheld the right of action in a Federal Court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the 14th Amendment."

Greene v. Louisville & I. R. Co., 244 *U. S.* 507.

In the case of Magnolia Bank v. Board of Supervisors the question here involved was discussed, and it was held that under the peculiar language of the Constitution of the State of Mississippi the principle under discussion could not be applied for the reason that the Mississippi constitution authorizes classification for the purposes of assessment and does not require that all property be assessed upon an equal and uniform basis, but the principle we contend for was sustained, as applicable under

a constitution requiring equality and uniformity in the assessment of all property by valuation.

Magnolia Bank v. *Board of Supervisors of Pike County*, 111 Miss. 857; 3 A. L. R. 1265.

Appended to the report of this case in the A. L. R. is an elaborate note which discusses this question and cites the authorities sustaining federal jurisdiction in such cases and holding that where there is an arbitrary assessment resulting from wilful discrimination or gross overvaluation systematically employed such an assessment is a denial of due process of law and equal protection of the law in violation of the Fourteenth Amendment.

The last case to recognize this doctrine is Keokuk & Hamilton Bridge Company v. Salm, reported in 256. U. S. 122, in which the federal claim was stated in the bill in very general terms but held sufficient to sustain the federal jurisdiction of the court. The bill was dismissed on a motion which amounted to a general demurrer for want of equity. The opinion recognized and admitted the authority of the Raymond and Green cases, and limited its authority to the question of equity jurisdiction. We shall again refer to this case when we come to answer directly the positions of counsel for Appellants.

(b) DEPARTURE FROM THE RULE OF THE ILLINOIS CONSTITUTION AND STATUTES IN MAKING ASSESSMENTS IS DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

It is now a well settled doctrine of this Court that where a State taxing board wilfully departs from the method of assessment and valuation prescribed by the Constitution and laws of a State requiring a uniform basis of assessment to the injury of taxpayers, such departure is a denial by the State of due process of law and the equal protection of the law; that such departure is itself conclusive evidence that the Board is not following the due process of law provided by the Constitution and laws of the State and their action is the action of those who betray their trust and use their official positions to oppress others; and, therefore, the State cannot justify their acts against attack in a Federal Court by the claim that they were violating its constitution and laws and not acting as its agent.

In the case of Ex parte Virginia, 100 U. S. 339, this Court said:

> "They, (the words of the Fourteenth Amendment here involved), have reference to the state actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The Constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. **Whoever, by virtue of public positions under a State government, deprives an-**

> other of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State. This must be so or the Constitutional inhibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."
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> McGehee on Due Process of Law, p. 27;
> *Ex. p. Virginia*, 100 U. S. 339;
> *Hovey* v. *Elliott*, 167 U. S., 409.

The same principle was emphasized by the late Judge Grosscup in these words:

> "The sum of it all is that by whatsoever causes brought about the reassessment complained of did not in our opinion express the real judgment of the State Board as an independent tribunal and were, therefore, in effect fictitious judgments for the impeachment of which, somewhere, the law holds out opportunity to the parties injured."
>
> *Chicago Union Traction Co.* v. *State Board of Equalization*, 114 Fed., 565.

He held that such opportunity was found in the original equity jurisdiction of the United States Circuit Court by injunction after the payment of tax equitably due.

In the Home Telephone Case all of the adverse dicta of this Court was considered and the principle established beyond controversy that where public officers depart

from the discharge of their duties under the law of a State and their unlawful action results in injury to a citizen that citizen may appeal to federal courts and claim the protection of the federal constitution, that the action of such public officers will be regarded as the action of the State, and that there may be a remedy under State law for the unlawful action is wholly immaterial.

Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S. 286; 57 L. ed. 514-515.

(c) ONLY NECESSARY TO PRESENT A FEDERAL QUESTION TO GIVE JURISDICTION.

If federal question is in good faith presented by pleadings that confers original jurisdiction, and even if upon demurrer, motion to dismiss, or a trial of the cause, it should occur that the claim of a federal question should be decided adversely to the plaintiff or complainant, that should not result in a dismissal of the cause, or adverse decision of the merits, if on the merits of the whole case the moving party is entitled to relief.

Jurisdiction of federal courts is sufficiently established if the title or right set up may be defeated by one construction of the Constitution and Laws of the United States and sustained by an opposite construction.

Osborne v. *U. S. Bank*, 9 Wheat (U. S.) 739-822;
Bors v. *Reston*, 111 U. S. 258; 26 L. ed. 421;
Kansas Pacific v. *Atchison R. R. Co.*, 112 U. S. 416; 28 L. ed. 795;

Pacific R. R. Co., Removal Cases, 115 U. S. 11-15; 29 L. ed. 323;
U. S. v. *Old Settlers*, 148 U. S. 469; 37 L. ed. 524.

If a controversy under the Constitution of the United States arises under a pleading it is immaterial whether that question is held decisive of the case. If decided adversely to the plaintiff it would nevertheless be the duty of the Court to proceed to a final consideration of the case upon the merits of all the questions presented.

This question was raised in the case of *Green* v. *Louisville & Interurban R. Co.*, 244 U. S. 499; 61 L. ed. 1281, where it was said:

> "The contention of plaintiffs, set forth in their respective bills of complaint, and the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the State and if carried out would violate the equal protection provision of the 14th Amendment, presents without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the Federal Court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that Court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of State law, irrespective of the disposition that may be made of the Federal question, or whether it be found neces-

sary to decide it at all. *Silver* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Ohio Tax Cases, 232 U. S. 576, 586, 58 L. ed. 732, 743, 34 Supt. Ct. Rep. 372."

It turned out that the court in this case declined to pass upon the question whether the action restrained was in violation of the Fourteenth Amendment to the Federal Constitution, yet jurisdiction was retained and the cause finally disposed of by the Supreme Court of the United States. Beginning on page 681, the Court said:

> "The next question in order is whether the assessments have the effect of denying to plaintiffs the equal protection of the laws, within the meaning of the 14th Amendment. It is obvious, however, in view of the result reached upon the question of State law, just discussed, that the disposition of the case would not be affected by whatever result we might reach upon the Federal question; for no other or greater relief is sought under the 'equal protection' clause than plaintiffs are entitled to under the provisions of the Constitution and laws the State to which we have referred. **Therefore, we find it unnecessary to express any opinion upon the question raised under the 14th Amendment.**"

Numerous previous cases from the Supreme Court of the United States announce the same doctrine.

It is clearly laid down in *City Railway Co.* v. *Citizens Railroad Company*, 166 U. S. 557. On page 562, in the above case, Justice Miller said:

"There can be no doubt that the Circuit Court had jurisdiction, notwithstanding the fact that both are corporations of the State of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill and not upon the facts as they subsequently turned out to be. * * * The gravamen of the bill is that * * * the Citizens Railroad Company had become vested with certain exclusive rights in the city of Indianapolis either in perpetuity or for the term of thirty or thirty-seven years, which the city had attempted to impair by entering into contract with the City Railway Company to lay and operate a railway upon the same streets. All that is necessary to establish jurisdiction of the court is to show that the complainant had or claimed in good faith to have a contract with the city which the latter had attempted to impair."

To the same effect is the decision in *Penn. Mutual Ins. Co.* v. *Austin*, 168 U. S. 685-695:

"The contention here made, however, is, not that the bill without color of right alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is unsound. The argument then is that the right of direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States unless the claim is well founded. But it can not be decided whether the claim is meritorious without taking jurisdiction of the case."

This same distinction was also clearly made by Mr. Justice Day when he was on the Circuit Court in *Louisville Trust Co.* v. *Stone*, 107 Fed. 305. On page 309 therein he said:

> "Notwithstanding the failure of the complainant to establish its relief upon the ground of Federal jurisdiction, alleging that the unjust discrimination against it in assessing its property at its full value while other property in the State was assessed at 70 percent. of its face value, thus depriving complainant of the equal protection of the laws under the Fourteenth Amendment, the jurisdiction of the Court having been invoked for that purpose the bill may be retained to administer full relief concerning the assessment upon the property of complainant upon the ownership of stock in the Mattingly Company. **If the claim to relief, clearly within the Federal jurisdiction, is fair and colorable not fictitious and fraudulent, jurisdiction attaches, although the ultimate decision may be against the right claimed.**"

Judge Clark draws the same distinction in *Louisville & Nashville etc., Ry. Co.* v. *Taylor*, 86 Fed. 168-178:

> "Whether there is a claim which presents a federal question, and whether that claim is well-founded are different and distinct questions. The one goes to jurisdiction and the other to the merits of the case. It is true that questions must be raised, and it is equally true that the court must take jurisdiction before it can determine whether the right is valid or well founded."

The authorities we have cited in this division of the argument make it apparent there was no substantial ground upon which appellants could have based any contention in the District Court, that the allegations of the bill were insufficient to confer federal jurisdiction. It is therefore not surprising that on the second motion to dismiss, that question was not raised, and was expressly waived on page 56 of appellant's original brief.

II.

DOES THE BILL SHOW ON ITS FACE THAT THE COMPLAINANTS ARE ENTITLED TO RELIEF IN A COURT OF EQUITY?

This question requires a consideration of the allegations of the bill. It is alleged that the arbitrary and wilful action of the State Board of Equalization and the Tax Commission in making the assessments of complainants property was fraudulent and, therefore, void. That is relied upon as a ground of equity jurisdiction, but the facts relating to fraud have been sufficiently stated in the preceding division of this argument and will not be repeated at this point. There are two other distinct grounds of equity jurisdiction fully appearing from the allegations of the bill to which special attention has not been drawn, namely, to avoid a multiplicity of suits, and the inadequacy of the procedure in a court of law to make the adjustments and state the account necessary in order to enable the court to arrive at the amount of taxes due the several municipalities and taxing districts of the several counties and the ascertainment of what tax is il-

legal and not due both on account of the overvaluation by the Board and Commission and the mistakes and excesses of Constitutional and statutory limitations in levying the taxes which rendered the same illegal and void; and against which this bill was directed as well as against the excess of taxes caused by over-valuation; of these in order stated.

(a) THE ASSESSMENTS MADE BY THE BOARD OF EQUALIZATION AND THE TAX COMMISSION ARE FRAUDULENT, AND FOR THAT REASON THE PUBLIC AUTHORITIES MAY BE RESTRAINED FROM ENFORCING THEM.

The principle is established both by the decisions of the Supreme Courts of Illinois and of the United States that the collection of taxes may be restrained if based upon a fraudulent assessment, and that is in accord with the principles stated in the elementary works treating of equity juprisdiction. Mr. High in his work on Injunctions says:

> "Notwithstanding the well established as above discussed, denying any supervisory power in courts of equity to revise the action of boards of review or equalization charged with the duty of revising and equalizing valuations and asessments, there have been instances of equitable interference by injunction to prevent the enforcement of taxes based upon such arbitrary, illegal or oppressive action upon the part of these boards as to amount to a fraud against the taxpayer, or to threaten a cloud upon his title, thereby bringing the case within the established jurisdiction of courts of equity. And where a State board

for the equalization of taxes undertakes to fix valuations upon taxable property through prejudice or a reckless disregard of duty, and makes a grossly arbitrary and unreasonable valuation, an injunction is regarded as the appropriate remedy."

I. High on Injunctions, Sec. 494.

That if a Board of Equalization or Assessment is guilty of fraud in assessing or equalizing the value of property upon which taxes are to be extended, equity will restrain the collection of the tax has been held and applied under various circumstances and without exception where equity has been resorted to in the first instance. Thus,

"Whenever the board undertakes to go beyond its jurisdiction, or to fix valuations through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere and protect taxpayers against the consequences of its acts."

The C. B. & Q. R. R. Co. v. *Cole*, et al., 75 Ill. 591.

Where an assessor changes an assessment after he has accepted a list, injunction will restrain a collection of the tax.

Cleghorn v. *Postlewaite*, 43 Ill. 428.

If the property is assessed fraudulently at too high a rate injunction will lie and the **remedy is cumulative to other legal remedies.**

I. C. R. R. Co. v. *Hodges*, 113 Ill. 323.

Equity jurisdiction attaches where the tax is fraudulently levied.

Du Page County v. *Jenks*, 65 Ill. 275.

In cases where there is fraudlent valuation of property for assessment the tax payer has an election in cases where there is also remedy at law as to whether he will pursue the remedy at law or his remedy in equity.

Carr v. *Arnold*, 239 Ill. 40.

In a large number of cases in this State where taxes based upon alleged fraudulent assessments and equalizations by the State Board of Equalization were about to be enforced through suits to enforce tax liens upor property the courts of this State have sustained injunctions to restrain the collection of such taxes both upon the ground of fraud and multiplicity of suits.

People v. *Hibernia Bank*, 345 Ill. 528;
Calumet Dock Co. v. *O'Connell*, 265 Ill. 106;
Calumet Dock Co. v. *Stuckart*, 276 Ill. 253;
Peoples Gas Light & Coke Co. v. *Stuckart*, 285 Ill. 164.

The same principle has been sustained in a large number of federal cases in the United States Supreme Court.

Davis v. *Gray*, 6 Wall. 220; 21 L. ed. 453;
Louisiana v. *Jumel*, 107 U. S. 758; 27 L. ed. 465;
Cunningham v. *Macon & B. R. R. Co.*, 109 U. S. 455; 27 L. ed. 993;

Pennoyer v. *McConnaughy*, 140 U. S. 10-18; 35 L. ed. 362;
Osborne v. *U. S. Bank*, 9 Wheat. (U. S.) 739;

This principle has been applied in a number of cases in which it was charged that the fraud of the taxing officers consists in the assessment for taxation of one class of property at a higher rate than another through a system adopted in violation of constitutional and statutory provisions requiring the taxation of all classes of property so that each would pay a tax in proportion to its fair value, or so that each person and corporation would pay a tax in proportion to the fair cash value of his, her or its property.

Raymond v. *Union Traction Co.*, 207 U. S. 20; 52 L. ed. 78;
Green v. *Louisville Interurban Co.*, 244 U. S. 499-521; 61 L. ed. 1280.

In the Raymond case it was said:

"We are also of the opinion that the case is one over which equity has jurisdiction. In *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153, 25 L. ed. 903, this court held that the case was one properly brought in equity. It was to restrain the collection of a tax. While the court held that the position of the bank as trustee entitled it to maintain an action in equity and also under the statute of Ohio, it was further held (page 157): 'Independently of this statute, however, we are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental prin-

ciple of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power.' We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly to that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if through mistake on the part of the State, through its board of equalization, and while acting as a quasi-judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity."

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20; 52 L. ed. 78.

"A court of equity has jurisdiction of suits to enjoin action looking to the enforcement of taxes upon the intangible property of public service corporations assessed under state authority, upon the ground of discrimination in valuation arising out of systematic undervaluation of other taxable property, where the bills assert that the unauthorized illegal valuation constitutes a cloud and a lien upon the plaintiff's property, and that, unless restrained, numerous and vexatious suits will be instituted to

foreclose such lien, together with civil, penal, or criminal proceedings based upon plaintiff's supposed delinquency in the payment of taxes."

Green v. *Louisville & Interurban R. Co.*, 244 U. S. 499; 61 L. ed. 1280.

What is here said applies as well to the method of collectiong taxes in Illinois, except that Illinois law provides no criminal remedy to enforce payment of taxes, and that differences, we submit, is immaterial.

(b) IT IS NOT NECESSARY THAT THERE SHOULD BE ACTUAL FRAUD IN ORDER TO RENDER THE ASSESSMENT INVALID; IF THERE IS CONSTRUCTIVE FRAUD, THAT IS AS EFFECTIVE TO VITIATE THE ASSESSMENT AS ACTUAL FRAUD.

Mr. Story says:

"Having thus considered some of the most important cases of actual, or meditated and intentional fraud, in which Courts of equity are accustomed to administer a plenary jurisdiction for relief, we may now pass to another class of frauds, which, as contradistinguished from the former, are treated as legal or constructive frauds. By constructive frauds are meant such acts or contracts, as, although not originating in any actual evil design, or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private of public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts done malo animo. Although, at first view, the doctrines on this subject,

may seem to be of an artificial, if not of an arbitrary character; yet, upon closer observation, they will be perceived to be founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice, after a wrong has been committed. By disarming the parties of all legal sanction and protection for their act, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue."

"Some of the cases under this head are principally so treated, because they are contrary to some general public policy, or to some fixed artificial policy of the law. Others, again, rather grow out of some special confidential or fiduciary relation between all the parties or between some of them, which is watched with especial jealousy and solicitude, because it affords the power and the means of taking advantage, or of exercising undue influence over others. And others, again, are of a mixed character, combining, in some degree, the ingredients of the preceding with others of a peculiar nature; **but they are chiefly prohibited, because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons, or unconscientiously compromise or injuriously affect the private interests, rights, or duties of the parties themselves.**"

I. Story's Equity Jurisprudence 10th ed. secs. 258-259.

"Where the thing generally results in injury and is contrary to equity or legal duty it is a constructive fraud."

Moore v. *School Trustee*, 19 Ill., 82.

"The law has a standard for measuring intent of parties and declares an illegal act prejudicial to the rights of others, a fraud upon such rights although the party denies all intention of committing a fraud."

Kirby v. *Ingersoll*, Har. 172.

"Constructive fraud consists in any act of ommission or commission contrary to legal or equitable duty, trust or confidence justly reposed which is contrary to good conscience. The former (actual fraud) implies moral guilt. The latter may be consistent with innocence."

Conyers v. *Graham*, 81 Ga. 615; 8 S. E. 521.

"A constructive fraud is an act which the law declares to be fraudulent without inquiring into the motive; but because arbitrary rules on the subject have been laid down or because the act carries in itself irresistible evidence of fraud."

McBroom v. *Rives*, 1 Stewart 72.

(c) FRAUD, THOUGH NOT EVIL INTENT.

In *Green* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, it is said:

"If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the full assessed property. And this is

true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination."

These authorities conclusively established that the allegations of the bill on the subject of fraud are sufficient to entitle the complainants to equitable relief. The default admits these allegations to be true, and, therefore, the bill should be sustained upon this ground.

(d) THE ALLEGATIONS OF THE BILL UNDER THE LAW OF ILLINOIS, OF WHICH THE COURT MUST TAKE JUDICIAL NOTICE, ARE SUFFICIENT TO SUSTAIN EQUITY JURISDICTION TO AVOID A MULTIPLICITY OF SUITS.

The ground that there is equity jurisdiction to avoid a multiplicity of suits is based upon the facts:

(a) That if the complainants had permitted tax proceedings to be brought against them they would have been liable to five several suits in separate counties to be tried by five separate tribunals local and subordinate in their nature and no relief could have been hoped for short of an appeal to the Supreme Court of the State requiring five separate appeals which might or might not have all been in the Supreme Court at the same time and that would have involved five original trials and five separate trials in the Supreme Court. There could have been no consolidation of these cases in the Supreme Court because the illegal tax complained of in the several counties would have involved entirely different questions respecting the levy and extension of the taxes.

(b) The Defendants, except Abbott, and the property would have been liable to these various proceedings:

(1) To be sued in actions of debt for the taxes which fell due while they were in custody of the property.

(2) To have their property destrained for the payment of such taxes under the warrant attached to the railroad tax book.

(3) Personal property described in the bill would in addition to proceedings for delinquent taxes in the County Court, and an action of debt for the recovery of taxes have been liable to destraint and sale without any judicial proceeding for all taxes which accrued during the four year period, on both personal and real property.

(4) If the complainants had paid the tax under protest and sought to recover it back, it would have been necessary to either restrain the collector of each county from paying the tax over to the municipal officers of the several taxing districts or follow the tax and bring separate suits against, under the averments of the bill, an average of fifteen separate sets of officers of cities, villages and other taxing districts in each county for the recovery of the tax.

The allegations bringing this case within the principle that equity will take jurisdiction to avoid a multiplicity of suits are that a separate suit would be brought

in each county and that if the tax should be paid under protest as to the State it could not be recovered back, and after it is distributed as required by law a great number of suits involving substantially like questions of law and fact and an expense entirely disproportionate to the amount to be recovered from each taxing district would be required.

This allegation is similar to that held sufficient in a number of Illinois cases. In the case of Raymond v. Union Traction Company, in which a similar suit as this was brought in the United States Circuit Court, it was said:

> "In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions designated in his tax books to the city treasurer of the City of Chicago, the county treasurer of the county of Cook, the treasurer of the Sanitary District, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the tax so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of the tax which would come to the State of Illinois could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commission deducted for the collection of the tax."

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20-41; 52 L. ed. 78.

A similar allegation was sustained in the case of Green v. Louisville & I. R. Co., in which a suit was brought to restrain the collection of a tax through the enforcement of tax liens where it was also charged that the assessment was in violation of the Fourteenth Amendment to the Federal Constitution and fraudulent.

Chicago Union Traction Co. v. *State Board of Equalization*, 114, Fed. 557;
Greene v. *Louisville & I. R. Co.*, 244 U. S. 499-521; 61 L. ed. 1280.

Similar suits were brought and sustained in the following Illinois cases:

People v. *Hibernia Bank*, 245 Ill. 528;
Calumet Dock Co. v. *O'Connell*, 265 Ill. 106;
Calumet Dock Co. v. *Stuckart*, 275 Ill. 253;
Peoples Gas Light & Coke Co. v. *Stuckart*, 286 Ill. 164.

These cases are in accord with the rule laid down in the works on Equity Jurisdiction. After stating the rule which was originally applied allowing a suit to be sustained in equity to avoid a multiplicity of suits only where there was a common right or community of interest in the subject matter of the controversy or a common title from which all their separate claims and all the questions at issue arise the general rule established by the weight of authority was stated by Mr. Pomeroy as follows:

"This early theory has, however, long been abandoned. The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically 'bills of peace,' but 'are analgous to' or 'within the principle of' such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortuous acts, invasion of property rights, violation of contract obligations, and, notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title' nor 'community of right' or of 'interest in the subject matter,' among these individuals, but where there is and because there is merely a community of interest among them in the question of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases, this community of interest in the question at issue and in the kind of relief sought, has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the

individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

1. Pomeroy Equity Jurisprudence, p. 500, pars. 268-269.

The authority of Mr. Pomeroy has been approved and adopted by the Supreme Court of Illinois as the existing law of this State in the following cases:

North American Ins. Co. v. *Yates*, 214 Ill. 283;
City of Chicago v. *Collins*, 175 Ill. 445;
German Alliance Ins. Co. v. *Van Cleave*, 191 Ill. 410;
City of Chicago v. *Chicago City Ry.*, 222 Ill. 576.

Cited in the notes under Sections 268 and 269 of Pomeroy's Equity Jurisprudence, 4th Ed., Volume 1, will be found a very large number of federal cases as well as cases decided by the courts of last resort of the various states of the union settling the modern law in relation to when a court of equity will intervene to avoid a multiplicity of suits, and sustaining the text of Mr. Pomeroy.

The law is now well settled both in state and federal jurisdiction that where it is necessary to prevent the inconvenience and expense of a number of suits at law, and the questions involved are of a similar nature or relate to the same matter, or some part of the claim is of an equitable nature or can be more adequately litigated

in a Court of Equity, a Court of Equity will take jurisdiction to avoid a multiplicity of suits. This comes through the natural development of equity jurisdiction from original principle as shown by Mr. Pomeroy and there can be no doubt that the allegations of this bill show that a multiplicity of suits was avoided by the bringing of this bill. It will be remembered that no suits were in fact brought before the bill was filed as shown by its allegations. Under the law of Illinois the suits immediately restrained would have been instituted by applications for judgment in the nature of proceedings *in rem*, which a preliminary injunction prevented.

We have discussed this question at this point as though a remedy at law under the constitution and laws of the State of Illinois is such a remedy as can be regarded by a federal court as an adequate remedy to deprive a federal court of jurisdiction in equity. Such, however, is not the case as we shall show when we come to reply to the contentions of counsel for Appellants.

(c) ONE OF THE WELL ESTABLISHED HEADS OF EQUITY JURISDICTION IS THAT, IF IN ORDER TO DO JUSTICE BETWEEN THE PARTIES, IT IS NECESSARY TO ENTER UPON AN INVOLVED OR COMPLICATED ACCOUNTING, WHICH CANNOT BE EFFICIENTLY AND ADEQUATELY DONE IN A COURT OF LAW BEFORE A JURY, EQUITY WILL ASSUME JURISDICTION FOR WANT OF AN ADEQUATE REMEDY AT LAW.

The bill alleges and shows that a Court of law could not have tried the issues involved in this case as efficiency and adequately as a Court of equity, because of the com-

plication and difficulty of the accounting necessary to determine the amount of taxes due the several taxing districts, the amount of taxes overcharged on account of excessive valuation and the illegal taxes charged in violation of specific provisions of the Constitution and laws of Illinois, by ignoring statutory requirements, and exceeding constitutional and statutory limitations in making levies.

We assert this without trepidation, notwithstanding the suggestion of counsel for Appellants that Appellees' counsel is too good a lawyer to contend that there is equity jurisdiction in this case. Because of the complication of the accounting shown to be necessary by the allegations of the bill, the specific difficulties which could not have been overcome or avoided in a Court at law are these:

(1) There could have been no tender as in equity, nor offer in a suit of law to pay such taxes as are equitably due, because that could not have been determined in a preliminary way by an interlocatory order.

(2) The suit at law would have had to be a contest of the validity of the entire tax, or the detail of tax rate making and extension would have had to be gone into before a jury.

(3) A jury could not have determined by an application of the rules in relation to the valuation and as-

sessment of property, the tax rates, the amount of tax to be extended, or the proportion of the amount of tax charged in the aggregate equitably due the several taxing districts and that overcharged against the complainants.

(4) A jury would not have been competent to ascertain whether the several taxes which the bill alleges were illegal on account of existing constitutional and statuary limitations and overcharges were in fact improperly charged against the property, nor the amount of such separate overcharges; nor could an issue have been formed at law in relation to these several items upon which the verdict of a jury might be taken, and if such issues had been practical they would have been so complicated and numerous that a suggestion of an accurate decision thereof by a jury on the several items is too absurd to think of attempting.

(5) Paragraphs 360-364 of the Revenue Laws of Illinois, (Cahill's Illinois Statutes, 1923, p. 2908-2911,) provide the manner of ascertaining the rate of taxation in each of the taxing districts by the application of what is known as the Juul Law through which on a statutory basis the rates of taxation ascertained from the applications of the levies of the several taxing districts must be reduced arbitrarily in order to effect a statutory equality

based upon the amounts of the several levies and controlled by the maximum levies allowed by constitution and by statutory limitations.

There is, perhaps, not an average of more than one person to a county in the State of Illinois, liable to jury service, sufficiently acquainted with the revenue laws of the State to apply accurately these statutes and ascertain whether there is or is not an excess of tax charged against property in any taxing district. This method applies to a large class of taxing districts in each of these several counties and to assume that questions of that sort can be tried in a court of law is unreasonable. That all of these questions could be tried in a court of equity and correctly decided there is beyond controversy.

An examination of the complainants' bill, which contains separate statements of the several kinds of taxes charged in the several taxing districts in each of the counties, amount of tax extended, the items of illegal tax and the tax admitted to be due, occupy fourteen pages of the bill. These were prepared by a tax expert, as the bill alleges, who went over the entire data and constructed these tables. It was an easy matter for the court below to enter a decree on default for the amount of tax admitted to be due and restrain the collection of that which their bill alleges is illegal and excessive, but had there been a denial of the allegations then, we sub-

mit, there would have resulted one of the most complicated proceedings in accounting before a Master or Referee that could be imagined.

The nature of the accounting in order to ascertain how much tax is due to each of the said several taxing districts under the allegations of the plaintiffs' bill is shown in detail by the bill, and one of the prayers of the bill is the ascertainment of the amounts due respectively and a decree for the payment of the same.

In order to facilitate the adjustment of the accounts the plaintiffs have employed an expert who has prepared schedules stating the amount due respectively to each of the taxing districts and this is averred and the schedules made a part of the bill. This alone is ground for a Court of Equity to take jurisdiction.

It is said, where it would be difficult if not impossible for a jury to unravel the numerous transactions involved and justice could not be done, except by employing the methods of investigation peculiar to Courts of Equity, equity has jurisdiction.

I. Corpus Juris, p. 619, sec. 64;

II. Story Equity Jurisprudence, 14th Ed., p. 8, sec. 591;

IV. Pomeroy Equity Jurisprudence, sec. 2357.

The authorities cited, we insist, establish the equity jurisdiction of this cause under the allegations of the bill upon the three specific grounds of fraud, to avoid a multiplicity of suits, and because in view of the peculiar allegations of the bill, the nature of the proof and the want of any other method of making an adjustment of the taxes due, no legal remedy could be adopted, if one had existed, and none existed. This is especially true in view of the fact that relief could only be had by the payment of the taxes admitted to be due, and the necessity of determining that question in a preliminary way before perpetually restraining the collection of the illegal and excessive tax.

III.

REPLY TO ARGUMENT OF APPELLANTS.

It is conceded by counsel for Appellants that the motion to discuss admitted the allegations of the bill, and that the sufficiency of the bill must be decided by its allegations. This is in part true and in part a misconception. In this Court the motion to dismiss can be considered as having put in issue only those allegations which it disputed. In other words, the motion to dismiss specified its grounds and cannot be broadened to include anything not specified. This is a principle so well-estab-

lished by authority that it is hardly necessary to cite Court decisions in its support, but is illustrated by these cases:

West Chicago Street Ry. v. *Krueger*, 168 Ill. 586;
Odin Coal Co. v. *Tadlock*, 216 Ill. 624;
C. B. & Q. R. Co. v. *Bantsch*, 127 Ill. App. 23.

The motion to dismiss being limited to the ground that the bill on its face does not state a case in equity entitling the complainants to relief, or for want of equity on the face of the bill, that is the only question properly before the Court in this appeal. Nevertheless, we shall reply to all arguments made by counsel for Appellants without regard to that limitation, notwithstanding such limitation it clearly appears both from the record and from the admissions of counsel on page 56 of his brief.

He assumes to analyze the facts in the case of *Greene* v. *Louisville and Interurban R. Co.*, 244 U. S. 499, and compare the facts of that case with the facts of the case at bar. Since we have fully set forth the allegations of Appellees' bill in the statement a mere comparison of its allegations with the quotation therefrom beginning on page 20 will demonstrate what effort counsel has made to minimize its allegations, and if the Court will compare the quotation from the bill in the Greene case beginning on page 17 of Appellants' brief with the statement of the material facts that bill as gleaned therefrom by this Court and stated by Justice Pitney on page 504 of the

opinion in the Greene case, (244 U. S. p. 504), it will be seen how counsel for Appellants has labored to exaggerate the material averments of the bill in that case. This method was followed by quoting part of the prayer for relief from Appellees' brief, (Rec. p. 46), (p. 20 of Appellants' brief), omitting the general prayer for relief and that part of the prayer which asked for a decree restraining the collection of all of the excessive and illegal tax alleged to be charged against Appellants' property by the averments of the bill. It was also claimed that the decree of the Court was limited to restrain the defendants from making application to the County Courts for judgment against the lands of Appellants for delinquent taxes, and had no reference to tax on personal property. But reference to the decree will show that there were findings covering the whole case and a decree restraining the collection of any of the illegal taxes and making perpetual the preliminary injunction which broadly restrained the collectors of the several counties from collecting or attempting to collect any taxes alleged by the bill to be illegal. (Rec. pp. 81-85, 51-52.) These allegations relate to tax on personal property as well as real estate as the allegations of the bill plainly show.

This was all to create a back ground for the assertion that the county collectors of the several counties could not seize the property of defendants or prosecute

any suit other than an application for judgment for delinquent taxes upon the theory that all the tax alleged to be charged against Appellants' property was real estate tax, and, therefore, there could be no distraint for its collection, nor any collection made except after a judicial proceeding which counsel for Appellants seem to argue would be due process of law, and, that, therefore, there would be no right of action in a Federal Court of equity to restrain such proceedings.

We think the fallacy of this contention has already appeared to this Court, but it will be further emphasized by calling direct attention to the fact that all of the property described in paragraph 3 of complainants' bill, except that denominated "railroad track" is personal property which counsel admits is subject to destraint under Illinois law without first obtaining judgment of a court of law. That would render all of the property known as "rolling stock" and all other movable property described in Paragraph 3 of the bill subject to destraint and sale at the will of the several collectors of taxes for the taxes claimed to be due in each of the several counties; and, by deference to marginal numbers 4 to 10 and 23 to 30 pages 2 to 5 and 10 to 15 of the appendix it will be seen that the statutes of Illinois not only authorize such proceeding for the collection of personal tax, but for the collection of unpaid real property tax, and that other suits at law may be brought against taxpayers than pro-

ceeding against real property for delinquent taxes in County Court, so the final contention of counsel based upon his elaborate statements about distinctive features of Illinois tax law falls of its own weight.

Counsel for Appellants was even mistaken in his assertion that a proceeding against property for judgment for delinquent taxes is a suit at law within the ordinary meaning of that phrase. Such a proceeding is not a suit at law, but it is a summary statutory proceeding *in rem* against property to enforce a lien for taxes, on merely constructive notice to the tax payer.

Gage v. *Nichols*, 135 Ill. 134;
Gage v. *Busse*, 114 Ill. 387;
Gage v. *Lyons*, 138 Ill. 594;
Gage v. *People*, 188 Ill. 95;
Gage v. *Pumpelly*, 115 U. S. 454.

The provisions of the Revenue Law authorizing the collection of tax upon real estate from personal property are as follows:

Section 254. "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector."

Section 255. "Personal property shall be liable for taxes levied on real property, and the real property shall be liable for taxes levied on personal property; but the tax on personal property shall not be charged against real property, except in case of removals, or where the tax cannot be made out of the

personal property; but the tax on real property may be made out of personal property, at any time after the tax becomes due, by any collector having the tax books in his hands by distraint and sale, in the manner provided by this Act."

Cahill, Ill., Stat. 1923, p. 2884.

Section 161 of the Revenue Law continues in force the warrant for the collection of taxes attached to tax books, even after the return of the books as follows:

"The power and duty to levy and collect any tax due and unpaid, shall continue in and devolve upon the county collector and his successors in office, after his return and final settlement until tax is paid; and the warrant attached to the collector's books, shall continue in force and confer authority upon the collector to whom the same was issued, and upon his successors in office, to collect any tax due and uncollected thereon, although such books may have been returned, or the tax carried forward into any other book."

Cahill, Ill. Stat. 1923, p. 2864.

The Supreme Court of Illinois has held that taxes on personal property must be collected from personal property before they can be collected from real estate.

C. V. & C. v. *Mathews*, 152, Ill. 53.

But Section 255 just quoted from provides that judgment against real property for non-payment of taxes shall not be prevented by showing that the owner thereof was possessed of personal property subject to distraint,

and no person shall be subject to have his personal property distrained and sold for tax on real estate which may have been listed and assessed in his name when he makes oath or otherwise satisfies the collector that he did not own such real estate. This settles beyond controversy that the whole fabric of this argument of counsel for Appellants is based upon a false theory, and a misunderstanding of Illinois statutes.

We have demonstrated the total misconception of counsel for Appelants of the law of Illinois, and as to the supposed difference between the law of Illinois and of Kentucky upon which he predicates his whole argument on this branch of the case. These supposed differences are emphasized in order to give force and weight to the opinion of this Court in the Keokuk & Hamilton Bridge case which it does not possess, he claiming that the laws of Illinois are in the respect that he alleges different, but they are in fact substantially like the laws of Kentucky, and the taxes against which the bill is directed include the tax on all personal property of this railway company. Moreover this Court recognized no such distinction as he has been laboring so hard to establish in the Bridge case.

We shall now endeavor to show that aside from this his whole contention is untenable and contrary to the settled law as established by the decisions of this court.

The specific contention is that the assignment in the motion to dismiss that the bill shows on its face an adequate remedy at law deprived United States District Court of jurisdiction in equity, and, therefore, the overruling of the motion to dismiss by the District Court was vitally erroneous and that the Appellants are entitled to a reversal of the decree for that error. This contention is wrong in two essential particulars: (a) The alleged adequate remedy at law is not in the Federal Courts, (b) it is immaterial what remedies may exist under State laws.

The adequate remedy at law that will deprive a federal court of equity jurisdiction must exist in the federal courts, otherwise it is plain that on the theory of counsel for Appellants the federal courts could be deprived of all their original equity jurisdiction by providing legal remedies to which resort might be had in the several states, so this court has said:

> "An adequate remedy at law created by State statutes and available in State Courts cannot oust the Federal Courts of their jurisdiction in equity."
>
> *Smith* v. *Reeves*, 178 U. S. 436;
> *Smyth* v. *Ames*, 169 U. S. 466;
> *Mississippi Mills* v. *Cohn*, 150 U. S. 202;
> *Arrowsmith* v. *Gleason*, 129 U. S. 86.

> "It is an absence of an adequate remedy at law in the national courts and that alone which conditions jurisdiction in equity in those courts."
>
> *National Surety Co.* v. *State Bank*, 120 Fed. 593; 56 CCA 656; 61 L. R. A. 394.

"A Federal Court of equity following the chancery precedents does not inquire about the remedies available in the State Court,(which for this purpose is a foreign tribunal), but whether a **Federal Court of law** offered an adequate remedy; and this inquiry is confined to the remedies in the Federal Courts no matter how ancient may be the remedies offered by the State. Congress may, of course, change the federal remedies from time to time; the change may be made by original legislation or by adopting the remedies of the State, but the test is always whether the remedy under examination is available in the **Federal Courts.** If it is not, its existence does not affect the equitable jurisdiction of the Circuit Court."

Bordens Conds. Milk v. *Baker*, 177 Fed. 906; 101 CCA 186.

Whether there may be remedies in the State Courts which pursued would afford relief to one oppressed by taking his property without due process of law or denying him the equal protection of the law would not compel him to resort to and exhaust those remedies before appealing to the original jurisdiction of the United States Courts for relief, has been considered frequently by this Court, and some members of the Court, notably Justice Holmes in his dissenting opinion in the Raymond case, have tried to maintain that doctrine as counsel for appellants insist is the law of this case. But, in the Home Telephone case Chief Justice White took occasion to review

all of the cases thought to tend in that direction and make a final statement of the law as follows:

"Before demonstrating the accuracy of the statement just made as to the essential result of the proposition relied upon by a reference to decided cases, in order that the appreciation of the cases may be made more salient, we contrast the meaning as above stated, which the 14th Amendment would have if the proposition was maintained, with the undoubted significance of that Amendment as established by many decisions of this Court.

"1. By the proposition the prohibitions and guaranties of the Amendment are addressed to and control the states only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until, by the decision of a court of last resort of a state, acts complained of under the 14th Amendment have been held valid, and therefore state acts in the fullest sense. To the contrary the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person, whether natural or judicial, who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted.

"2. As previously stated, the proposition relied upon presupposes that the terms of the 14th Amendment reach only acts done by State officers which are within the scope of the power conferred by the state. The proposition, hence, applies to the prohibitions of the Amendment the law of principal and

agent governing contracts between individuals, and consequently assumes that no act done by an officer of a State is within the reach of the Amendment unless such act can be held to be the act of the state by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them, and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

"To speak broadly, the difference between the proposition insisted upon and the true meaning of

the Amendment is this: that the one assumes that the Amendment virtually contemplates alone wrongs authorized by a state, and gives only power accordingly, while in truth the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words, the Amendment looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as the instrument for doing wrongs, provided against all and for every such possible contingency. Thus, the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed. Under these circumstances it may not be doubted that where a state officer, under an assertion of power from the state, is doing an act which could only be done upon the predicate that there was such pawer, the inquiry as to the repugnancy of the act to the 14th Amendment cannot be avoid by insisting that there is a want of power. That is to say, a state officer cannot, on the one hand, as a means of doing a wrong forbidden by the Amendment, proceed upon the assumption of the possession of state power, and at the same time, for the purpose of avoiding the application of the Amendment, deny

the power and thus accomplish the wrong. To repeat: for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer, in virtue of state power, is doing an act which, if permitted to be done, *prima facie* would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority."

Home Telephone & Telegraph Co. v. Los Angeles, 227 U .S. 286, 287, 288, 289; 57 L. ed. 515.

We submit that this authority completely meets and refutes the fine-spun and sophistical argument of counsel for appellants and settles that all of the contentions made in his brief against appellees' bill are unsound.

Counsel for appellants bases his entire argument upon the supposed force of certain language used by Justice Brandeis in the Keokuk & Hamilton Bridge Company case and attempts to make that language establish that if there is a remedy under the laws of a State for an enfringement of a constitutional right protected by the Federal Constitution, and also protected by the State Constitution, the injured party cannot resort to the Federal Courts and obtain relief in the exercise of their original jurisdiction, but must wait until he has exhausted his remedies under State laws, thus abrogating the paramount jurisdiction of Federal Courts and de-

priving them of their original jurisdiction to vindicate the Consttution and laws of the United States for which such jurisdiction was established. Such contention is patently in conflict with the opinion of Justice White. This Court never intended language used in the opinion of the Bridge case to be used or applied for the opinion carefully emphasized what should be considered before entering upon a discussion of the merits in these words:

> "Whether the bill sets forth a case for equitable relief is the only question requiring consideration."

If other things were considered, as counsel argues, then they were considered in the way of *obiter dicta*, and not in decision of the question the Court had so carefully stated. Moreover, as we have already shown, the allegations of the bill in the Keokuk & Hamilton Bridge case were so meagre and barren of the statement of pertinent fact that the Court could not treat it as a reasonable effort at statement of a cause of action, and doubtless that is what the Court attempted to emphasize in the language which counsel for appellants attempts to misapply. One point suggested by the opinion would have been ample to warrant the view of the Court that the bill was totally wanting of proper allegations, which deficiency was stated in these words:

> "The amount of the tax payable was, therefore, the only matter in controversy. Under such

circumstances a plaintiff seeking an injunction must aver payment or tender of the amount of taxes confessedly due, or at least offer to pay such amount as the Court may find to be justly and equitably due. *People's National Bank* v. *Marye*, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. The bill contains no such allegation."

Keokuk & Hamilton Bridge Co. v. *Salm*, 258 U. S. 126; 66 L. ed. 499.

Respectfully submitting these views and citations of authority as conclusive against all contentions of appellants we insist that the United States District Court decided accurately that the bill states a case within the equitable jurisdiction of the United States District Court. That was the only question submitted to that Court, and, therefore the decree rendered upon confession of the facts stated in the bill should be affirmed.

Geo. B. Gillespie.
Attorney for Appellees.

APPENDIX OF ILLINOIS TAX LAWS.

This appendix includes the pertinent provisions of the constitution and statutes of Illinois in relation to the assessment and collection of taxes, both upon the general property of the State and property of such corporation as are assessed by the State Tax Commission and formerly by the State Board of Equalization.

EQUALITY PROVISION OF CONSTITUTION PUTTING ALL PHYSICAL PROPERTY IN ONE CLASS FOR TAXATION.

1 "The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; * * *"

Cahill Ill. Stat. 1923, Sec. I. Art. IX, p. 32.

ROLLING STOCK OF RAILWAYS MADE PERSONAL PROPERTY BY CONSTITUTION.

Section 10, of Article XI, of the Constitution of 1870, provides:

2 "The rolling stock, and all other movable property belonging to any railroad company or corporation, in this State, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the General Assembly shall pass no law exempting any such property from execution and sale."

BOARD COULD NOT REDUCE AGGREGATE VALUATION IN STATE.

3 "but said board shall not reduce the aggregate assessed valuation in the State; neither shall it increase said aggregate valuation, except in such an amount as may be reasonably necessary to a just equalization, and not exceeding one per cent. on such aggregate assessed valuation; but this rule shall not apply to railroad property."

Jones & Addington Ill. Stat. 5507, Par. 9324, Sec. 105.

SWORN LISTS OF RAILROAD PROPERTY TO BE RETURNED.

4 Section 40 of the Revenue Law provides:

"Every person, company or corporation, owning, operating or constructing a railroad in this State, shall return sworn lists or schedules of the taxable property of such railroad, as hereinafter provided. Such property shall be listed and assessed with reference to the amount, kind and value on the first day of April of the year in which it is listed."

Cahill Ill. Stat. 1923, p. 2840.

5 Section 41, requires the filing of sworn schedules with the County Clerk,

"showing the property held for right of way, and the length of the main and all side and second tracks and turnouts in such county, and in each city, town, and village in the county, through or into which the road may run, and describing each tract of land, other than a city, town, or village lot, through which the road may run, in accordance with the United States surveys, giving the width and length of the strip of land held in each tract, and the number of acres thereof. They shall also state the value of improvements and stations located on the

right of way. * * * When such statement shall have been once made, it shall not be necessary to report the description as hereinbefore required, unless directed so to do by the county board; but the company shall, during the month of April, annually, report the value of such property, by the description set forth in the next section of this Act, and note all additions or changes in such right of way as shall have occurred."

Cahill Ill. Stat. 1923, p. 2840.

"RAILROAD TRACK" IS REAL ESTATE.

6 Section 42, provides:

"Such right of way, including the superstructures of main, side or second track and turnouts, and the stations and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line in entering the county, city, town or village, and extending to the point where such track crosses the boundary line leaving such county, city, town or village, or to the point of termination in the same, as the case may be, containing————acres, more or less. * * *"

Cahill Ill. Stat. 1923, p. 2841.

HOW VALUE OF "RAILROAD TRACK" ASSESSMENT DISTRIBUTED FOR ASSESSMENT.

7 Section 43, provides:

"The value of the 'railroad track' shall be listed and taxed in the several counties, towns,

villages, districts and cities, in the proportion that the length of the main track in such county, town, village, district or city bears to the whole length of the road in this State, except the value of the side or second track, and all turnouts, and all station houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county, town, village, district or city in which the same are located."

Cahill Ill. Stat. 1923, p. 2841.

ALL MOVABLE PROPERTY INCLUDING ROLLING STOCK PERSONAL PROPERTY. HOW ASSESSED.

8 Section 44, provides:

"The movable property belonging to a railroad company shall be held to be personal property, and denominated, for the purpose of taxation, 'rolling stock'. Every person, company or corporation owning, constructing or operating a railroad in this State, shall, in the month of April, annually, return a list or schedule ,which shall contain a correct detailed inventory of all the rolling-stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping and dining cars, express cars, baggage cars, house (horse) cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars, and all other kinds of cars."

Cahill Ill. Stat. 1923, p. 2841.

ROLLING-STOCK TO BE LISTED IS TAXING DISTRICTS IN PROPORTION TO MAIN TRACK MILEAGE.

9 Section 45, provides:

"The rolling-stock shall be listed and taxed in the several counties, towns, villages, districts and cities, in the proportion that the length of the main track used or operated, * * *" therein.

Cahill Ill. Stat. 1923, p. 2841.

PROPERTY OTHER THAN "RAILROAD TRACK" AND "ROLLING STOCK," MANNER OF ASSESSMENT.

10 Section 46, provides that the tools and materials for repairs and other personal property of the railroad, except rolling-stock shall be listed and assessed where it is located.

Cahill Ill. Stat. 1923, p. 2841.

11 Section 47, provides that all real estate, including the stations and other buildings and structures thereon other than that denominated "railroad track", belonging to any railroad shall be listed as lands and lots as the case may be in the county, town or village, and provision is made for the assessment of all other property of railroads than "railroad track" and "rolling stock" by local assessors.

Cahill Ill. Stat. 1923, p. 2841.

12 Section 48, provides for an additional schedule to enable the Board of Equalization to assess the capital stock of railroads.

Cahill Ill. Stat. 1923, p. 2842.

PENALTY FOR FAILURE TO FILE SCHEDULES.

13 Section 49, requires that schedules shall be filed with the Auditor of Public Accounts, and with the local assessors and fixes a penalty for failure to do so.

Cahill Ill. Stat. 1923, p. 2842.

AUDITOR TO LAY SCHEDULES AND STATEMENTS BEFORE BOARD.

14 Section 50, provides:

"The Auditor shall, annually, on the meeting of the State Board of Equalization, lay before said board the statements and schedules

herein required to be returned to him; and said board shall assess such property in the manner hereinafter provided."

Cahill Ill. Stat. 1923, p. 2842.

RAILROAD TAX BOOK, WARRANT FOR COLLECTION.

15 Section 51, requires the County Clerk to procure at the expense of the county a record book properly ruled and headed in which to enter the railroad property of all kinds as listed for taxation, and that he should enter the valuation as assessed, corrected and equalized in the manner provided by the act; and, that he should extend the tax thereon upon such equalized value against the property liable therefor.

"And at the proper time fixed by this Act for delivering tax books to the county collector, the clerk shall attach a warrant, under his seal of office, and deliver said book to the county collector, upon which the said county collector is hereby required to collect the taxes therein charged against railroad property, and pay over and account for the same in the manner provided in other cases. Said book shall be returned by the collector and be filed in the office of the county clerk for future use."

Cahill Ill. Stat. 1923, p. 2842.

POWERS AND DUTIES OF TAX COMMISSION.

"The Tax Commission shall: * * *

16 "(3) Prescribe general rules and regulations, not inconsistent with law, for local assessment officers relative to the assessment of property for taxation, which general rules and regulations shall be binding upon all local assessment officers and shall be obeyed by them respectively until reversed, annulled or modified by a court of competent jurisdiction;

"(4) Prescribe or approve the form of blanks for schedules, returns, reports, complaints, notices and other documents, files and records authorized or required by any provision of law relating to the assessment of property, or by any rule and regulation of the commision and all assessing officers shall use true copies of such blank forms;

"(5) Assess the railroad property denominated "railroad track" and "rolling-stock"; * * *

"(7) Equalize the valuation and assessment of property throughout the State between the different counties of the State and fix the aggregate amount of the assessment for each county upon which taxes shall be extended.

Cahill Ill. Stat. 1923, p. 2851.

Section 3 of the Act confers duties upon the Commission as follows: * * *

"(6) To order in any year a re-assessment of all real and personal property or real or personal property, or any class of personal property, in any county, or in any assessment district thereof, which in its judgment such re-assessment is desirable or necessary, and for that purpose to cause such re-assessment to be made by the local assessment officers, and to cause it to be substituted for the original assessment;"

"(7) To take testimony and proofs under oath and to require the production of books, papers and documents pertinent to any assessment, investigation or inquiry and for that purpose to subpoena and compel the attendance of witnesses;"

Cahill Ill. Stat. 1923, p. 2852.

Section 10, of the Act provides:

"Any person feeling himself aggrieved by any assessment made by the Tax Commission may appeal to the Circuit Court of the county in which such property or some part thereof is situated, for the purpose of having the lawfulness of such assessment inquired into and determined.

17 "The person taking such appeal shall file with the Tax Commission written notice of such appeal, which notice shall state in full the grounds of such appeal. Such notice of appeal shall be filed within ten days after such assessment is made and notice given thereof. Thereupon the Tax Commission shall prepare and transmit to the clerk of the court to which such appeal is taken a copy of such notice of appeal and a copy of all evidence, documents, papers, books and files pertaining to such appeal, which copies shall be certified to as correct by the Director of France. The appeal shall be heard without formal pleadings upon the record so certified by the Tax Commission. Appeals shall lie from the judgment of the Circuit Court to the Supreme Court. The remedy by appeal herein provided for shall not be construed to be exclusive."

Cahill Ill. Stat. 1923, p. 2853.

18 Section 18 of the Act defines the equalizing power of the Commission:

"The Tax Commission shall act as an equalizing authority. It shall examine the abstracts of property assessed for taxation in the several counties as returned by the county clerks and the original assessments made by it, and shall equalize the assessments as in this Act provided. The Tax Commission may so lower or raise the total assessed value of property in any county as returned by the county clerk as shall make

the property in such county bear a just relation to the assessed value of property in other counties. The total amount of such increase or decrease in any one county shall not exceed ten per cent of the total assessed value of all property in the State as returned for purposes of taxation. The Tax Commission shall not reduce the aggregate assessed valuation in the State; nor shall it increase such aggregate valuation, except in such amount as may be necessary to a just equalization."

Cahill Ill. Stat. 1923, p. 2854.

GENERAL TAX BOOKS.

19 Section 123 provides:

"The county clerk shall, annually, make out for the use of collectors, in books to be furnished by the county, correct lists of taxable property, as assesed and equalized."

Cahill Ill. Stat. 1923, p. 2857.

20 Then follows in Sections 124-131, inclusive, directions for making up the collector's books, and Section 132 is as follows:

"To each collector's book a warrant, under the hand and official seal of the county clerk, shall be annexed, commanding the collector to collect from the several persons named in said book the several sums entered in the column of totals opposite their respective names. The warrant shall direct the collector to pay over the several kinds of taxes that may be collected by him to the respective officers entitled thereto, less the compensation for collection allowed him by law.

Cahill Ill. Stat. 1923, p. 2858.

WHEN TAX BOOKS DELIVERED.

21 Section 135 requires

"The respective county clerks shall, on or before the twentieth day after the first day of December, annually, or as soon thereafter as the collectors are duly qualified, deliver to them the books for the collection of taxes; and it shall be the duty of the collectors, within such time, or as soon thereafter as they are qualified, to call at the clerk's office and receive said books. The tax book, provided for collecting all taxes charged against railroad property and the capital stock of telegraph companies, shall be delivered to the county collector within the same time, annually, or as soon thereafter as he is qualified."

Cahill Ill. Stat. 1923, p. 2859.

DUTIES OF TOWN AND DISTRICT COLLECTORS.

22 Section 136:

"To each town or district collector's book a warrant, under the hand of the county clerk and seal of his office, shall be annexed, commanding such town or district collector to collect from the several persons named in said town or district collector's book, the several sums of taxes therein charged opposite their respective names."

Cahill Ill. Stat. 1923, p. 2859.

DISTRESS TO COLLECT PERSONAL TAX.

23 Section 137, provides:

"In all cases the warrant shall authorize the town or district collector, in case any person named in such collector's book shall neglect or refuse to pay his personal property tax, to levy the same by distress and sale of the goods and chattels of such person; and it shall require all payments therein specified to be made by such

town or district collector on or before the tenth day of March next ensuing."

Cahill Ill. Stat. 1923, p. 2859.

LEVIES TO COLLECT TAXES.

24 Section 156, provides:

"In case any person, company or corporation shall refuse or neglect to pay the taxes imposed on him or them, when demanded, it shall be the duty of the collector to levy the same, together with the costs and charges that may accrue, by distress and sale of the personal property of the person, company or corporation who ought to pay the same."

Cahill Ill. Stat. 1923, p. 2863.

POWER TO LEVY AND COLLECT PERSONAL TAX AFTER RETURN OF WARRANT.

25 Section 161 of the Revenue Law provides:

"The power and duty to levy and collect any tax due and unpaid, shall continue in and devolve upon the county collector and his successors in office, after his return and final settlement until the tax is paid; and the warrant attached to the collector's book, shall continue in force and confer authority upon the collector to whom the same was directed.

METHODS OF ENFORCING COLLECTION OF TAXES.

26 Section 173, provides:

"Each town or district collector shall particularly note, in his returns to the county collector, all cases of personal property tax that he was unable to collect, which can be made from real estate of the persons owing such tax."

Cahill Ill. Stat. 1923, p. 2866.

27 Section 183 provides for the collection of delinquent personal tax from real estate and further provides,

> "When it becomes necessary to charge the tax on personal property against real property, the county collector shall select for that purpose some particular tract or lots of real property owned by the person owing such personal property tax; and in his advertisement for judgment and sale, shall designate the particular tract or lots of real property against which such personal property tax is charged, and in the list filed for judgment, the same facts shall be shown, and the court shall take cognizance thereof, and give judgment against such tract or lots of real property, for such personal property tax."

Cahill Ill. Stat. 1923, p. 2868.

LIEN ON REAL ESTATE FOR UNPAID TAXES.

28 Section 253:

> "The taxes upon real property, together with all penalties, interests and costs that may accrue thereon, shall be a prior and first lien on such real property, superior to all other liens and incumbrances, from and including the first day of May in the year in which taxes are levied until the same are paid; which lien may be foreclosed in equity, in any court of competent jurisdiction, in the name of the People of the State of Illinois, whenever taxes for two or more years, upon the same description of property, shall have been forfeited to the State, and may be sold under the order of the court by the person having authority to receive State and county taxes, with the same notice to interested parties and right of redemption from said sale as is now provided by law, and in conformity with Section four (4) and five (5) of Article IX, of the Constitution of this State. In proceedings to foreclose the tax lien on any real property,, the amount due on the collector's books against the said property shall be *prima facie* evidence of

the amount of taxes against the real property. When any taxes are collected in any such foreclosure proceedings, they shall be paid to the county collector, to be distributed by him to the respective authorities entitled thereto.

Cahill Ill. Stat. 1923, p. 2884.

WHEN LIEN ATTACHES TO PERSONAL PROPERTY.

29 Section 254:

"The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector."

Cahill Ill. Stat. 1923, p. 2884.

PERSONAL PROPERTY LIABLE FOR TAX ON REAL ESTATE

30 Section 255:

"Personal property shall be liable for taxes levied on real property, and the real property shall be liable for taxes levied on personal property; but the tax on personal property shall not be charged against real property, except in cases of removals, or where said tax cannot be made out of the personal property; but the tax on real property may be made out of personal property, at any time after the tax becomes due, by any collector having the tax books in his hands by distraint and sale, in the manner provided in this Act: *Provided*, the judgment against real property, for non-payment of taxes thereon shall not be prevented by showing that the owner thereof was possessed of personal property subject to distraint; and no person shall be subject to have his personal property distrained and sold for tax on real estate, which may have been listed and assessed in his name, when he makes oath, or otherwise satisfies the collector, that he did not own such real property on the preceding first day of May."

Cahill Ill. Stat. 1923, p. 2884.

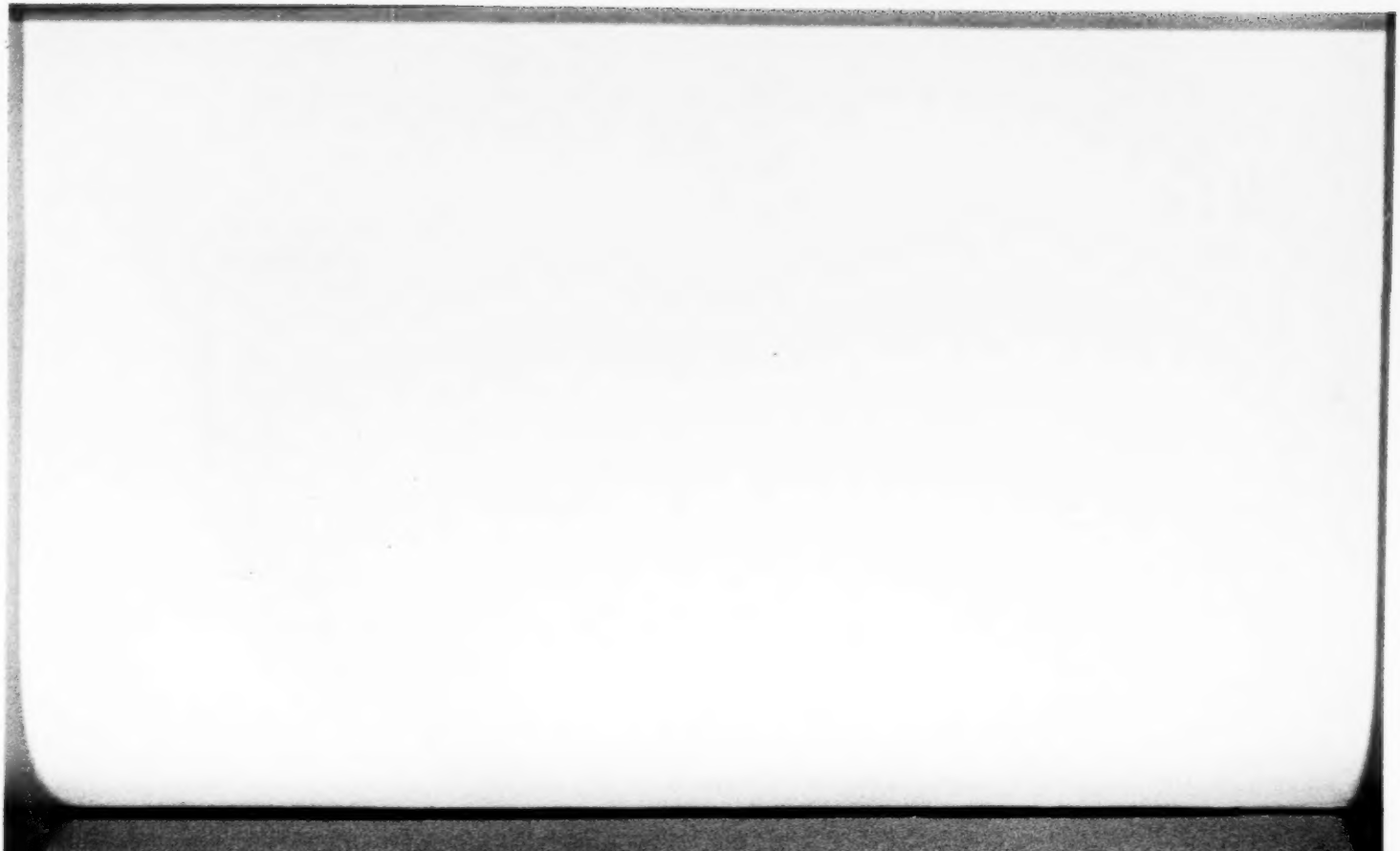
PERSONAL LIABILITY FOR FAILURE TO PAY TAX.

31 Section 230:

"The county board may, at any time, institute suit in an action of debt in the name of the People of the State of Illinois in any court of competent jurisdiction for the whole amount due for taxes and special assessments on forfeited property; or any county, city, town, school district or other municipal corporation to which any such tax or special assessment may be due, may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax or special assessment due any such corporation on forfeited property, and prosecute the same to final judgment. The county board may also, at any time, institute suit in an action of debt in the name of the People of the State of Illinois, in any court of competent jurisdiction, against any person, firm or corporation, for the recovery of any personal property tax due from such person, firm, or corporation, and in any such suit for the recovery of personal property tax, the return of the county collector that such taxes are delinquent, shall be *prima facie* evidence that such taxes are due and unpair, but the fact that such taxes are due and unpaid may be proven by other competent testimony. This act shall apply to all taxes heretofore levied against any person, firm or corporation and now upon any assessment book or roll, and on the sale of any property following such judgment on execution or otherwise, any such county, city, town, school district or other municipal corporation, interested in the collection of said tax, may become purchaser at such sale of either real or personal property, and if the property so sold is not redeemed (in case of real estate) may acquire, hold sell and dispose of the title thereto, the same as individuals may do under the laws of this State, and in any such suit or trial for forfeited taxes, the fact that real estate or

personal property is assessed to a person, firm or corporation, shall be *prima facie* evidence that such person, firm or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made, and such fact may be proved by the introduction in evidence of the proper assessment book or roll, or other competent proof."

Cahill Ill. Stat. 1923, p. 2880.



Supreme Court, U. S.
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No. 131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1923.

W. FISH WILSON, County Collector of Taxes of the County of Marion; RICHARD FARRELL, County Collector of Taxes of the County of Clinton; WILLIAM H. PORTER, County Collector of Taxes of the County of Washington; JAMES H. THIMMING, County Collector of Taxes of the County of Perry; and JAMES H. McGUIRE, County Collector of Taxes of the County of Randolph, in the State of Illinois,

Appellants.

vs.

ILLINOIS SOUTHERN RAILWAY COMPANY, WILLIAM F. WHEELOCK, as Receiver of the Property of the ILLINOIS SOUTHERN RAILWAY COMPANY; WILLIAM T. ABBOTT, Trustee of the Bondholders of the ILLINOIS SOUTHERN RAILWAY COMPANY and THE MISSOURI AND ILLINOIS RAILROAD COMPANY,

Appellees.

Appeal from the District Court of the United States for the Southern District of Illinois.

REPLY BRIEF OF APPELLEES ON THEIR MOTION TO DISMISS FOR WANT OF JURISDICTION OR TRANSFER CAUSE.

GEO. B. GILLESPIE,
Attorney for Appellees.

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Appellants,

v.

ILLINOIS SOUTHERN RAILWAY COMPANY, WILLIAM W. WHEELOCK, as Receiver of the Property of the ILLINOIS SOUTHERN RAILWAY COMPANY; WILLIAM T. ABBOTT, Trustee of the Bondholders of the ILLINOIS SOUTHERN RAILWAY COMPANY and THE MISSOURI AND ILLINOIS RAILROAD COMPANY,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

REPLY BRIEF OF APPELLEES ON THEIR MOTION TO DISMISS FOR WANT OF JURISDICTION OR TRANSFER CAUSE.

STATEMENT.

The Brief of Appellants in opposition to the motion of Appellees to dismiss, concedes that the statements of fact in Appellees' Brief are correct. This involves the following admissions:

(1) That the original motion to dissolve the temporary injunction was based solely upon special grounds enumerated and did not raise the question of federal jurisdiction.

(2) That the question actually in issue and passed upon by the Court was whether upon the face of the bill facts were stated to bring the case within the jurisdiction of a court of equity.

(3) That the jurisdictional question was neither raised nor certified to this Court, and, therefore, is here not directly involved as a question presented to or adjudicated by the court below.

(4) That the memorandum of the District Judge, notifying counsel of his decision on the second motion to dismiss, distinctly stated that the only question passed upon by the Court was whether there was equity on the face of the bill.

Counsel for appellants specifies the grounds set forth in that motion on page 2 of his brief, and it clearly shows that only the question of *equity jurisdiction* was raised on that motion. It is true that in the first paragraph it is alleged that the only vice of the assessments of the Board of Equalization and the Tax Commission charged in the bill was, "discriminatory over-valuation of complainants' property," and in the second paragraph

claims that there was an adequate remedy at law, but he construed the words of his motion in its last paragraph according to their natural import in these words, as follows:

> "Wherefore, the defendants respectfully pray that the order of reference may be set aside, the answer of defendants withdrawn and leave to file this motion granted, and **upon the final hearing of this motion the same may be sustained and the bill of complainants dismissed for want of equity.**"

It is a familiar doctrine that mere discrimination in making an assessment of property for taxation is not a ground for the interposition of a court of equity, but there must, in addition to discrimination, be either actual or constructive fraud in making the assessment.

Counsel for appellant not only recognized that no federal question was raised at the hearing in the Court below, but if such question had been raised, expressly waived it when he said on page 56 of his brief:

> "First. There must be federal jurisdiction or a federal question. This requirement is met in all of the cases" (referring to the cases just previously discussed in the brief), "as well as in the case at bar, with the averment that the taxpayer is about to be deprived of his property without due process of law."

The only effort of counsel to avoid the force of the record and his admission is to quote the following words from page 10 of his brief:

> "Are the facts alleged in the bill sufficient to give a federal court equitable jurisdiction to enjoin the collection of the taxes in question on the ground that such collection would amount to a taking of the property of appellees without due process of law and constitute a denial of the equal protection of the laws; and are the facts, as stated in the bill, sufficient to show that the taxpayer has no adequate remedy at law?"

It is true that statement is made, but subsequently on page 56 he limits his attack upon the ruling of the District Court to the contention that the taxpayer had an adequate remedy at law. This is but language of appellants' brief, but it only has reference to the distinction between jurisdiction at law and in equity. However, the authorities conclusively show that counsel cannot in this Court, either by his brief or by an assignment of errors, import a question into the case which the record of the trial court does not present, and it is plain from the record that this case did not involve the construction or application of the Constitution of the United States within the meaning of Section 238 of the Judicial Code. Nevertheless, counsel by artificial reasoning attempts to show that a federal question was involved in his conten-

tion that there was an adequate remedy under the constitutional laws of the State of Illinois, which we shall show is directly in conflict with the former decisions of this Court; and, in order to base such an argument as that upon the record, counsel for appellants was put to the extreme necessity of misconstruing the allegations of our bill to be directed at a proposed action of the judicial department of the State of Illinois, in accordance with the Constitution and laws of the State, which will clearly appear not to be the case by a casual reading of the bill. The complaint is of the conduct of the State Board of Equalization and the Tax Commission, and not of the courts, nor of the Constitution or laws of the State.

BRIEF OF ARGUMENT.

It is apparent from the Brief of Appellants that their counsel misconceived the jurisdiction of this Court and the method of invoking it. The United States District Court is given jurisdiction, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand ($3,000.00) dollars," (a) arising "under the Constitution and laws of the United States." Yet not in every case brought in that Court is the question "in controversy" or "involved," whether the suit arises under the Constitution and laws of the United States. If the question of federal jurisdiction is raised and controverted, then the question of jurisdiction is "in controversy" or "involved," but if conceded that question is not "in controversy" and is, therefore, not a question which can thereafter be raised in the United States Supreme Court, because of the express language of Section 238 of the Judicial Code, which provides for the Appellate jurisdiction of that Court, and confers the same in any case that involves the construction or application of the Constitution of the United States. As we have shown by our original brief, where that question is not in issue and the case is decided upon some other ground, then it cannot be said that a

federal question was "in controversy" or "involved." Whether the construction of the Constitution was involved in the District Court is not determined from the allegations of the pleadings, if the record shows that it was not in fact in issue; and before this Court would be warranted in considering any case upon the theory that a federal question was involved, it should appear upon the face of the record that it was insisted by the defendant that no constitutional question was involved upon the one hand, and the complainant must have contended that such question was involved upon the other; and that must have been an issue between them which was not waived or agreed to, but controverted. In other words, the record must show an actual issue and contention between the parties upon that subject, which required the District Court to construe or apply the Constitution judicially, but counsel for appellants try to raise this issue by asserting that in their insistence that there was an adequate remedy under the laws of the State of Illinois raised the question of whether the property of appellees was about to be taken without due process of law. A little far-fetched, we submit, and we shall see that their whole theory is not only contrary to the record, but in conflict with the law.

The argument of counsel for appellants, based upon the allegations of appellees' bill, which it is alleged show

an adequate remedy under the laws of the State of Illinois, is founded upon a total misconception of the allegations of the bill, the relief prayed and the decree entered.

Appellants' counsel try to convince this Court that the bill complains only of the taxing officers, and that the injunction was only to restrain them from enforcing the valid laws of the State of Illinois and afford due process of law; and seek to lead this Court to ignore the allegations of the bill which charge directly and affirmatively that the want of due process of law was in the arbitrary, wilful and unlawful conduct of the State Board of Equalization and the Tax Commission in making grossly excessive assessments of appellee's property, well-knowing that the values fixed thereon for the purposes of taxation were many times in excess of the fair cash value required by the provisions of the Constitution and the laws of Illinois as the basis of assessment, and grossly discriminatory againt appellants, and in favor of all personal property systematically valued by local assessors at more than 30 per cent below its fair cash value for assessment. To establish this contention they quote from paragraph IX of the Bill, (Record Page 46), but even that paragraph shows that the allegation is directed against the State of Illinois in the exercise of its taxing power through the State Board of Equalization, the Tax

Commission and the other taxing officers of the State. The averment is,

> "that in the proceedings aforesaid, and in the manner and form aforesaid the **State of Illinois** by and through the action of its **State Board of Equalization and State Tax Commission** and other taxing officers is threatening to and will, unless said taxing officers are restrained, * * * deny * * * equal protection of the Constitution and laws, etc."

To say that the construction placed on this language by counsel for appellants is strained and unreasonable, but temperately expresses the fact, and reading the allegations of the bill referred to by the words of the paragraph, "in the proceedings and in the manner and form aforesaid," this Court will be surprised that such a construction as that of counsel for appellants should have been placed upon the bill by one who is acquainted with its allegations.

They are equally mistaken and uninformed as to the prayer of the bill and the decree of the Court. Quotations from them in appellants' brief are designed to limit them to a prayer for relief against the application for judgment and sale for delinquent taxes and it is said the decree only granted such relief.

In addition to the relief mentioned in the quotation from the prayer of the bill, on page 5 of appellants'

brief, on record page 47 will be found the following additional prayer:

> "and determine the taxes, equitably due to the said several taxing districts upon a lawful assessment of said property, and upon a determination thereof order and decree the full satisfaction of any tax remaining due and unpaid, and upon the payment thereto perpetually enjoin and restrain the said defendants and their successors in office from collecting said unlawful taxes, interests, penalties and costs found to be in excess of that legally due to each of the said defendants upon such accounting."

The decree, in addition to the words quoted on pages 6 and 7 of appellants' brief, pertinently contains the following among the findings (Record, pp. 81-82):

> "3. That the complainants, prior to the commencement of this suit, tendered to each of the said defendants all of the taxes legally due to them, respectively, as county collectors of their respective counties, and such tax was accepted by them.
>
> "4. That all other taxes, interests, penalties and costs charged and extended against the property of the complainants for the years 1917, 1918, 1919 and 1920, in each of the several counties of Marion, Clinton, Washington, Perry and Randolph, in the State of Illinois, are excessive, fraudulent and void, and were extended upon an assessment made by the Board of Equalization for the years 1917 and 1918 and by the Tax Commission of the State of Illinois for the years 1919 and 1920, in violation of the Fourteenth Amendment to the Constitution of

the United States of America, in that in the assessment, levy and extension of said tax the complainants were denied the equal protection of the laws by the State Board of Equalization and the taxing officers of the State of Illinois, and the assessment, levy and extension of said tax was and is an attempt to and would take the property of the said complainants without due process of law.

"5. That the complainants are entitled to an injunction as prayed restraining the said defendants and each of them from the collection of said tax, and to have the injunction heretofore issued herein made permanent."

And in the decretal part of the order is the following:

"* * * that the preliminary injunction granted herein be and the same is hereby continued in full force and virtue." (P. R. 85.)

The preliminary injunction (Rec. p. 58) restrains said county collectors "from attempting to enforce the collection of any of said taxes from any of the said property, or from the property of either of the said complainants, for any delinquent taxes for any of the years 1917 to 1920, inclusive." It therefore appears that not only were the taxing officers restrained from applying for judgment for delinquent taxes in the manner described in the bill, but from taking personal property by distress, as they might have done under the

provisions of Section 255 of the Revenue Law, which provides:

> "Personal property shall be liable for taxes levied on real property, and the real property shall be liable for taxes levied on personal property; but the tax on personal property shall not be charged against real property, except in cases of removals, or where said tax cannot be made out of the personal property; but the tax on real property may be made out of personal property, at any time after the tax becomes due, by any collector having the tax books in his hands by distraint and sale, in the manner provided in this Act: *Provided*, the judgment against real property, for non-payment of taxes thereon, shall not be prevented by showing that the owner thereof was possessed of personal property subject to distraint; and no person shall be subject to have his personal property distrained and sold for tax on real estate, which may have been listed and assessed in his name, when he makes oath, or otherwise satisfies the collector, that he did not own such real property on the preceding first day of May."
>
> Cahill Ill. Stat. 1923, p. 2884, Sec. 255.

Counsel for appellants has stated and reiterated in his brief that the complainants' bill does not describe personal property as being taxed, and that all taxes levied was upon real estate. Reference to Paragraph 3 of the Bill will show that "rolling stock" and all other personal property is included, and the averments of the bill all relate to the property described in that paragraph.

Reference to Section 10 of Article XI of the Constitution of Illinois, Cahill's Illinois Statutes 1923, p. 37, would have disclosed to counsel for appellants the following Constitutional provision:

> "The rolling stock, and all other movable property belonging to any railroad company or corporation in this State, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the General Assembly shall pass no law exempting any such property from execution and sale."

We have drawn attention to these misconceptions and mistatements not in an effort to refute them as having any possible bearing upon the question before this Court, but to show that counsel for appellants is entirely mistaken as to what the record actually contains and as to what the intent of our bill is. His whole argument is predicated upon the assumption that we are complaining of taxing officers for attempting to enforce the Constitution and valid laws, and he assumes that if the constitution and laws of Illinois are in harmony with the Constitution and laws of the United States that deprives the Federal Courts of their jurisdiction to enforce the Federal constitution and laws made in pursuance thereof, if violated by any individual, member of a board or other body exercising authority under the Constitution and

laws of the State in denying to any citizen due process of the law or equal protection of the law.

It is true that in every such case there may be a remedy under the laws of the State, but that does not deprive the Federal Courts of their paramount jurisdiction to enforce the Constitution and laws of the United States whenever they are violated without waiting to see what the State may do on account of a violation of its Constitution and laws.

If the principle that counsel for appellants advances was correct, then the Federal Courts would never have jurisdiction to enforce the due process and equal protection clauses of the Fourteenth Amendment until the State remedies had been exhausted, and, therefore, the United States District Court would never have jurisdiction of such a case, because at the point of exhausting State remedies the appellee would always go directly to the Supreme Court of the United States.

It will be observed that in his discussion of the subject of due process of law counsel for appellants has said much about due process of law so far as court procedure is concerned, but remains silent as to what is required to constitute due process of law in a State Board of Equalization or a State Tax Commission or other person or body exercising State power.

These questions have been discussed by this and other Federal Courts, but counsel for appellants seem to have overlooked, misconceived, or perceived, the force of such discussions and has not referred to them.

The allegations of complainants' bill on the subject of due process of law relate entirely to the action of the State Board of Equalization and the State Tax Commission. McGehee on due process of Law says:

> "While the English provision exists solely against executive action, under our system of paramount written constitutions, to which all departments of the government are equally subject, the provision extends alike to the executive, judicial, and legislative activities of the states and the nation."
>
> McGehee Due Process of Law, p. 26;
>
> See also, *Chicago R. Co.* v. *Chicago*, 166 U. S., 226.

Due process of law and law of the land are phrases indicating practically the same thing. Mr. Webster, in the Dartmouth College case, gave a definition to due process of law or law of the land which endures to this time and is as follows:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society."

This Court has said:

"Due process of law within the meaning of the (Fourteenth) Amendment is secured if the laws operate on all alike and do not subject the individual to any arbitrary exercise of the powers of government."

Giozza v. *Turman*, 148 U. S., 657;
Yick Wo v. *Hopkins*, 118 U. S., 356.

This Court also said:

"They, (the words of the Fourteenth Amendment here involved), have reference to the state actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The Constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. **Whoever, by virtue of public positions under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State.** This must be so or the Constitutional inhibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

McGehee on Due Process of Law, p. 27;
Ex. p. Virginia, 100 U. S. 339;
Hovey v. *Elliott*, 167 U. S., 409.

In a case somewhat similar to this in which the State Board of Equalization being mandamused by the Supreme Court to re-assemble and make an assessment of property in accordance with the law, arbitrarily and wilfully assessed the same without the exercise of judgment or discretion under circumstances which indicated either that the board acted under fear of contempt of the Supreme Court, or out of resentment because they had been commanded to re-assemble and do their work over. After discussing that situation Judge Grosscup, sitting as a circuit judge, deduced the correct principle as follows:

> "The sum of it all is that by whatsoever causes brought about the reassessment complained of did not in our opinion express the **real judgment of the State Board as an independent tribunal and were, therefore, in effect fictitious judgments for the impeachment of which, somewhere, the law holds out opportunity to the parties injured.**"
>
> *Chicago Union Traction Co.* v. *State Board of Equalization*, 114 Fed., 565.

He then concluded that as the constitution and laws of Illinois provided due process of law and the Board of Equalization wilfully and intentionally departed therefrom and assessed the property involved in that suit at a grossly excessive valuation as compared with the assessment of other property of the State without exercising any judgment, but arbitrarily, that such action was a

denial of due process of law, that the Board of Equalization represented the State, its action was State action, and its want of the exercise of judgment from whatever cause gave to the aggrieved taxapayer the right to resort to the federal courts under protection of the due process of law provision of the Fourteenth Amendment of the Constitution. His discussion of the subject is most interesting and illuminating and is as follows:

> "Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the state. It includes the initial authority to levy taxes; the purpose to which the money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards or of men. Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for the tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes in the laying and distributing of which there is a substantial departure from law, is the depriving of the citizen of his property without due process of law.
>
> "A substantial step in the taxing process as fixed by the law of Illinois as a step essential to the distribution of the burdens of taxation, is the decision and judgment of the State Board of Equalization. The board's place in the taxing system is that of a quasi-judicial body. Its judgment affects, as

keenly as that of any court, the property interests collectively of the several districts of the State, and directly and individually of the persons and corporations owning franchises.

"No court can by its judgment grasp more completely what would otherwise remain the property of the individual. In no other tribunal can there be found apter illustration of the power of the State to compel the individual to deliver up his property under stress of law. It needs no argument to show that power such as this is only exercised rightfully when exercised judicially. The prime quality of every judgment, without which it is no judgment, is, that it is the final thought of the judge on the subject submitted, unaffected by extrinsic influences. This implies freedom of mind—not merely theoretically, but practically—the freedom of mind that does not fear, that has no wish of its own, that sees nothing not seen through the senses of the law. Judgments honestly made up in such an atmosphere, though subject to review for error, are due process of law. Judgments affected by fraud or fear, however solemnly entered are nothing, when weighed by the constitutional guaranties thrown around liberty and property."

Chicago Union Traction Co. v. *State Board of Equalization*, 114 Fed., 566.

These authorities are not cited for the purpose of showing to the Court that a federal question was involved in the court below. That can only be determined from an inspection of the record, but they answer the falla-

cious position of counsel for appellants, and show that the vital allegations of our bill relate to a real want of due process of law in the action of the Board of Equalization and Tax Commission, in assessing complainants' property, as charged in paragraphs V to VIII, inclusive, of complainants' bill.

Counsel have said a great deal concerning remedies at law under the Statutes of Illinois, and insisted that if there is a remedy thereunder there can be no remedy in exercise of the original jurisdiction of the United States District Court in the enforcement of the provisions of the Federal Constitution. A mere statement of this proposition discloses its absurdity. That a government having independent and paramount power and jurisdiction cannot vindicate its constitution and laws because the suitor might resort to an inferior jurisdiction is an absurdity which one would not expect to find in properly coordinated government, and that it is not found in this government is beyond all controversy.

A long argument is made in the original brief and glimpses of the theory there advanced are presented by this brief to establish that there is an adequate remedy at law under the Statutes of Illinois for a violation of the Illinois Constitution and Statutes, and that, therefore, although the Constitution and Statutes of the United States have also been violated by the same act,

there can be no remedy in the federal courts until State remedies have been exhausted. And, in discussing that doctrine, it has been repeated many times that there is an adequate remedy at law in the procedure devised for the enforced collection of taxes, and that inasmuch as such procedure is due process of law, there is an adequate remedy at law in Illinois.

This whole theory is predicated upon a misconception of what is meant by adequate remedy at law as related to the jurisdiction of federal courts of equity, and what is meant by the original jurisdiction of federal courts. The adequate remedy at law that will deprive a federal court of equity jurisdiction must exist in federal courts, otherwise it is plain that on the theory of counsel for appellants the federal courts could be deprived of all of their original equity jurisdiction by providing legal remedies to which they might resort in the several states. So, the law is settled to be:

> "An adequate remedy at law created by State statute and available in State courts cannot oust the federal courts of their jurisdiction in equity."
>
> *Smith* v. *Reeves*, 178 U. S., 436;
> *Smyth* v. *Ames*, 169 U. S., 466;
> *Mississippi Mills* v. *Cohn*, 150 U. S., 202;
> *Arrowsmith* v. *Gleason*, 129 U. S. 86.
>
> "It is an absence of an adequate remedy at law in the **national** courts and that alone which conditions jurisdiction in equity in those courts."

National Surety Co. v. *State Bank*, 120 Fed. 593;
56 CCA 656;
61 L. R. A. 394.

"A Federal Court of equity following the chancery precedents does not inquire about the remedies available in the State Court, (which for this purpose is a foreign tribunal), but whether a **Federal Court of law** offered an adequate remedy; and this inquiry is confined to the remedies in the Federal Courts no matter how ancient may be the remedies offered by the State. Congress may, of course, change the federal remedies from time to time; the change may be made by original legislation or by adopting the remedies of the State, but the test is always whether the remedy under examination is available in the **Federal Courts**. If it is not, its existence does not affect the equitable jurisdiction of the Circuit Court."

Bordens Conds. Milk v. *Baker*, 177 Fed. 906; 101 CCA 186.

The contention, that the insistence of appellants' counsel that the complainants had an adequate remedy under the laws of Illinois, was tantamount to a denial of the allegations of complainants' bill that the State of Illinois was about to take appellees' property without due process of law is predicated upon the theory that the bill was directed solely at Court procedure under Illinois Statutes, which we have shown is not true by directing attention to the allegations of the bill and to the words of the decree of the Court. So, if that is what counsel meant in the contention there was an adequate

remedy **at law,** they not only failed to employ apt words to express their intentions but sought to make an issue upon allegations which the bill does not in fact contain. If at the time counsel for appellants filed the motion to reconsider the previous order of the Court overruling the motion to dissolve the preliminary injunction and dismiss the bill, they wanted to raise the question whether the allegations of want of due process of law were insufficient, is it not strange they did not say so? And if they then thought that the bill was framed on the theory that proposed court action in conformity with valid laws was in violation of the due process clause, and that a denial of such allegations would put in issue the federal question of want of due process of law, why did they not use apt words to express that idea, instead of assigning the ground, **"Complainants have an adequate remedy at law?"** Why did they not say, "an adequate remedy under the laws of Illinois" instead of specifying **"remedy at law,"** as distinguished from remedies **in equity?** In view of the allegations of the bill, the specifications of the additional motion to dismiss, the order of the Court overruling the second motion to dismiss, the memorandum of the Court showing that counsel acquiesced in and did not contest the allegations of the bill charging want of due process of law at the argument of that motion, and the express admission of appellants' original brief, page 56, that the allegation of want of due process of law is

sufficient, does not appear that the present contentions are an after thought?

If the motion of appellants to reconsider and dismiss on the ground that there is an adequate remedy at law by necessary implication raises the federal question, whether the bill contains sufficient allegations of want of due process of law, then it would be immaterial whether the motion to reconsider and dismiss be regarded as in effect a general or special demurrer; for, in that case the federal question would have been raised; but they deem it important to assert that the motion to reconsider and dismiss must be given the effect of a **general demurrer.** What is the difference? Why a general demurrer puts in issue all the material allegations of the bill, while a special demurrer puts in issue only such allegations as it questions. On appeal or error, a motion that specifies the grounds upon which it is based will always be treated as having restricted the mover to the grounds stated therein in the court of review.

W. Chicago St. Ry. Co. v. *Krueger* 168 Ill., 586;
Odin Coal Co. v. *Tadlock*, 216 Ill., 624;
C. B. & Q. R. Co. v. *Bautsch* 129 Ill. App. 23.

Both motions to dismiss are based alone upon special grounds, with no words questioning the general sufficiency of the bill. It is not now contended that there was any effort to question the sufficiency of the allegations of the bill that in making the alleged fraudulent assess-

ments, the taxing officers of Illinois, denied to the complainants the equal protection of the law, nor can anything in the record be tortured into an indication that such question was raised or considered; therefore it was wholly unnecessary for the District Court to consider whether the allegations of want of due process of law were sufficient, conceding for the argument that question was properly raised, which it clearly was not, for in that case, jurisdiction would be sustained by unchallenged averments in the bill. This state of the record clearly closes the lips of appellants upon this question.

Aside from all this, however, the whole legal premises of counsel's argument has been cut away by the previous decisions of this Court. There is nothing more definitely settled than that what remedies may exist under the laws of Illinois for a violation of the Constitution of that State by denying due process of law, is wholly immaterial to the jurisdiction of the Federal Courts. In the Home Telephone & Telegraph Co. case, Chief Justice White fully analyzed the present contentions of counsel for appellant and held them unsound. He fully reviewed the previous relevant opinions of this Court, and stated the law so clearly, and upon such a basis of sound reasoning and common sense that there can be no justification for reopening the question, and if counsel had in fact advanced the theory he now is attempting to construe into

the record, in the District Court, it would have been met by a citation of the Home Telephone & Telegraph case, and would in view of that case have been held to be frivolous.

The law as settled by the Home Telephone & Telegraph case is:

> "1. By the proposition the prohibitions and guaranties of the Amendment are addressed to and control the states only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until, by the decision of a court of last resort of a state, acts complained of under the 14th Amendment have been held valid, and therefore state acts in the fullest sense. To the contrary, the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person, whether natural or juridical, who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted.
>
> "2. As previously stated, the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by state officers which are within the scope of the power conferred by the state. The proposition, hence, applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals, and consequently assumes that no act done by an officer of a state is within the reach of the amend-

ment unless such act of the state by the application of such law of agency. In other words, the proposition is that the amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them, and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again in the settled construction of the amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrong which the amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the amendment is that where an officer or other representative of state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S., 286, 287; 57 L. Ed., 514, 515.

Assuming that the present contentions of counsel for appellants are justified by the record and well founded

in the law, both of which we think we have shown not to be the case, still in making the contention, as they allege that there was an adequate remedy at law, or under the laws of Illinois, they would have but raised a jurisdictional question, and no jurisdictional question has been certified to this Court, therefore, at all events this case, even in that event would have had to be dismissed or transferred.

Two cases are cited as the basis for the fanciful theory advanced by counsel for appellants: *Keokuk & Hamilton Bridge Company* v. *Salm*, 256 U. S., 122 and *Wells Fargo & Co.* v. *Nevada*, 248 U. S., 191. Neither of these cases has the remotest application to the question now before the Court. The Keokuk & Hamilton Bridge case is cited to sustain a contention directly in the teeth of the able opinion of Chief Justice White in the Home Telephone case, which clearly it does not purport to do. Justice Brandeis wrote his opinion in the Bridge case upon the facts presented by that record which bear no analogy to the facts of the case at bar. There a motion to dismiss for want of equity had been sustained, and this Court affirmed the decree of the District Court. That action was based on the averments of that bill, and no lawyer can examine its allegations without coming to the conclusion reached by this Court. It wholly failed to state a case either within the jurisdiction of the District

Court as a federal court, or showing the complainant was entitled to relief in a court of equity. There was nothing stated but some general conclusions of the pleader. For convenient reference we print the allegations of that bill in the back of this reply as an appendix. Its deficiencies will be readily seen. There was no motion to dismiss in that case, and, therefore, the questions we present here were not raised.

In the Wells Fargo case the attack was upon the constitutionality of a statute which it was claimed did not provide for due process of law, because it did not require notice of the assessment, and it was held that since the tax could not be collected without judgment in a Court, in which proceeding summons must be served upon the taxpayer, the want of notice of the assessment did not render the law invalid as a denial of due process of law. We are unable to perceive that anything said in that case has bearing here. In that case there was no claim of wilful and arbitrary departure by State officers from the due process of law provided by the Constitution and Statutes of the State as here, and, therefore, the principles applicable there have no application here. The contention was that to follow the law of Nevada would conflict with the Constitution of the United States. Here it is contended that the departure of the State Board of Equalization and the Tax Commission from the method

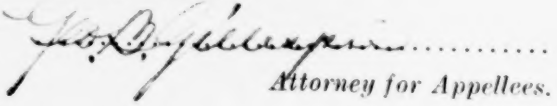
of assessment prescribed by the Constitution and laws of the State was a violation of the due process clause of the State Constitution as well as the due process and equal protection clauses of the Federal Constitution.

Finally, it was in no event necessary for the United States District Court to pass upon whether there was in fact due process of law or equal protection of the law in making the assessment of complainants' property. This Court has held many times that where a federal question is in good faith raised in the pleadings that confers jurisdiction, and if the case upon the whole shows that the plaintiff or complainant is entitled to relief upon other grounds, the federal question may be left undecided and the relief be granted. The record shows that is precisely what was done in this case, and that with the acquiescence and subsequent ratification and approval of counsel for appellants. The principle here invoked was applied in *Green* v. *Louisville & Interurban Company*, 244 U. S., 499. See, also, *Osborn* v. *U. S. Bank*, 9 Wheat., 739; *Bors* v. *Reston*, 111 U. S., 258; *Kansas* v. *Atchison R. R. Co.*, 112 U. S., 416; *Pacific R. Co., Removal cases*, 115 U. S., 11; *United States* v. *Old Settlers*, 149 U. S., 468.

We respectfully submit that the record plainly shows that there was no construction or application of the Constitution of the United States by the District Court

as necessary under Section 238 of the Judicial Code to confer jurisdiction upon this Court; that the jurisdiction of the District Court as a federal court was conceded by appellants at the hearing on the second motion to dismiss, and expressly waived on page 56 of their original brief; that the positions and arguments now advanced to avoid that situation are unsound, shifty and sophistical; and

We therefore pray a dismissal or transfer of this appeal for want of jurisdiction.



Attorney for Appellees.

APPENDIX

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DIVISION OF THE
SOUTHERN DISTRICT OF ILLINOIS.

KEOKUK & HAMILTON BRIDGE COMPANY,
Complainant,
v
FRED SALM, JR., ELMER F. DENNIS, WILLIAM E. MILLER, ARCH C. WILLIAMS, J. H. HELMS AND CHAS. S. TYLER,
Defendants.
} IN EQUITY.

SYNOPSIS OF BILL.

(Jurisdictional Averments in Black Type.)

AFTER THE ADDRESS THE STATEMENT OF THE CORPORATE NAME, THE ORGANIZATION OF THE CORPORATION AND THE CONSTRUCTION AND LOCATION OF THE BRIDGE, AND AN AVERMENT THAT THE SAME WAS ASSESSED BY A CERTAIN DESCRIPTION FOR THE YEAR 1918 AT $100,000.00, THE BILL CONTAINS THE FOLLOWING AVERMENTS:

Your Orator further shows unto your Honors, that the defendants as individuals and in their official capacities have assessed your Orator's property as alleged on a basis of about 150 per cent valuation, whereas in truth and in fact the defendants as individuals and assessors of this County and State arbitrarily, intentionally and systematically as shown, assessed the property of individ-

uals and of corporations within the sphere of duty at a total taxable value of said property of forty percent of its fair cash value; that the fact that such systematic assessment upon said basis annually for many years past has been a matter of public notoriety in the state.

Your Orator further shows that under the laws and Constitution of the State of Illinois all property real and personal must and shall be uniformly assessed at such fair and equal valuations, that the defendants by their acts as individuals and official capacity as herein assessing and seeking to collect taxes against your Orator on **this unfair, unequal and discriminatory valuation** and in defiance of the Constitution and laws of said State and denying to your Orators the equal protection of the laws and seeking to take Orators property without due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

(Averment that bridge should have been assessed by Board of Equalization.)

Whereas defendants have intentionally, systematically and persistently assessed other classes of property of similar sharacter and value at about forty per cent of such fair cash value and thereby is and has deprived complainant of the equal protection of the laws and taking complainant's property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

That unless restrained and enjoined by this Honorable Court the defendants will individually and as such officials proceed in every way to becloud by judgment or otherwise complainants' said property, and will cause judgments to be entered upon said alleged delinquent list against complainants' said property, and to have execution issued and complainants' property sold at execution to satisfy such illegal and void taxes, and in all these and other ways irreparably injure and destroy complaints' bridge and railroad track and property.

Wherefore complainant prays that the defendants and each of them, whether as individuals or as officials, in said taxing matters, be enjoined and forever restrained from so doing. Your orator further shows that since the acts and doings of defendants are now going on and will result in the wrongful acts herein complained of before this litigation may terminate, your orator prays that an injunction *pendente lite* herein, and such other relief as the equities of the case may require.

To the end, therefore, that the defendants may show if they can why your orator, complainant herein, should not have relief herein prayed for, and may make true and perfect answers accordingly to the best of their respective knowledge and belief to the several matters herein set forth, the same as if they would specifically here repeat, but not under oath, answer, under oath being waived.

May it please your Honors to grant to your orators a writ of subpoena and respondendem, issuing out of and under the seal of this Honorable Court to the said defendants and each of them, as such defendants commanding them and each of them to be and appear and make answer under this bill of complaint and to perform and abide by such order and decree or decrees as the Court may see fit in equity and good conscience to decree herein.